

EXHIBIT C

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

STATE CORPORATION COMMISSION

FEB 16 2005

 Docket
Room

In the Matter of the Petition of the CLEC)
Coalition for Arbitration against)
Southwestern Bell Telephone, L.P. d/b/a) Docket No. 05-BTKT-365-ARB
SBC Kansas under Section 252(b) of the)
Telecommunications Act of 1996.)

In the Matter of the Application of AT&T)
Communications of the Southwest, Inc.)
and TCG Kansas City, Inc. for Compulsory) Docket No. 05-AT&T-366-ARB
Arbitration of Unresolved Issues with SBC)
Kansas Pursuant to Section 252(b) of the)
Telecommunications Act of 1996.)

In the Matter of the Request of the CLEC)
Joint Petitioners for Arbitration with South-)
western Bell Telephone L.P. d/b/a SBC)
Kansas for an interconnection Agreement) Docket No. 05-TPCT-369-ARB
that Complies with Section 251 and 271)
of the Federal Telecommunications Act)
of 1996.)

In the Matter of the Petition of Navigator)
Telecommunications, LLC for Arbitration)
against Southwestern Bell Telephone, L.P.) Docket No. 05-NVTT-370-ARB
d/b/a SBC Kansas Pursuant to Section)
252(b)(1) of the Telecommunications Act)
of 1996.)

Arbitrator's Determination of Issues

The above matter comes before Arbitrator Robert L. Lehr, appointed by The State Corporation Commission of the State of Kansas (Commission) for consideration and recommendation. Being duly advised in the premises and familiar with all matters of record, the Arbitrator finds and concludes as follows.

Pertinent Procedural Background

1. The Commission opened Docket No. 04-SWBT-763-GIT (763 Docket) to provide a proceeding to establish a successor agreement to the Kansas 271 Agreement (K2A).¹ In its order of November 18, 2004, in the 763 Docket, the Commission noted that SWBT had provided its Request to Negotiate a successor agreement to each CLEC operating under the K2A which extended the terms, conditions and rates of the K2A until February 16, 2005. The Commission stressed that a CLEC must file a petition for arbitration by October 29, 2004, in order to participate in any arbitration regarding a K2A replacement agreement.

2. Petitions for Arbitration were timely filed by the CLEC Coalition, AT&T/TCG, CLEC Joint Petitioners and Navigator Telecommunications, LLC. By Commission Order, these Petitions for Arbitration were consolidated into one proceeding. The Commission advised the parties that the arbitration would be conducted on a modified "final offer" issue-by-issue basis. The arbitrator could add or delete terms only to assure compliance with 47 U.S.C. § 252(e). The Commission designated the undersigned as arbitrator.

3. Two pre-hearing conferences were conducted whereby procedural schedules were established. The Arbitrator determined that the arbitration would proceed with panels of witnesses and that he and Commission Staff would question the witnesses. The parties' counsels would also have the opportunity to ask questions as deemed necessary.

¹The K2A was the standard interconnection agreement available to any competitive local exchange carrier (CLEC) containing the terms, conditions and rates governing CLECs' access to the Southwestern Bell Telephone Company (SWBT) network. The K2A was critical to the Commission's support of SWBT's Application before the Federal Communications Commission (FCC) pursuant to 47 U.S.C. § 271. When the FCC approved SWBT's 271 Application, the K2A was available to CLECs for four years from the date the Commission approved the K2A and ending October 4, 2004. K2A General Terms and Conditions, ¶ 4.1.

4. The arbitration was conducted January 11 -13, 2005. Post-hearing briefs were due on January 24, 2005, and the Arbitrator's Recommendation due on February 16, 2005.

5. The Arbitrator will discuss the parties' positions and recommended language, and make his determinations of the issues generally in the order that they were presented during the arbitration. Issues that have been settled between and among the parties will not be addressed.

General Terms and Conditions--251/271

AT&T GTC-1; CLEC Coalition GTC-1

6. SWBT proposes language that would exclude references to, or obligations under, §§ 271 and 272 of the federal Telecommunications Act of 1996 (Act) in the interconnection agreement:

The underlying Interconnection Agreement sets forth the terms and conditions pursuant to which SBC-Kansas agrees to provide AT&T with access to unbundled network elements under Section 251(c)(3) of the Act, Collocation under Section 251(c)(6) of the Act, Interconnection under Section 251(c)(2) of the Act and/or Resale under Section 251(c)(2) of the Act in SBC-Kansas' incumbent local exchange areas for the provision of AT&T's Telecommunications Services.²

SWBT contends that this arbitration is limited to §§ 251 and 252 of the Act, pertaining to terms of interconnection, unbundling and resale. SWBT admits that it is subject to certain 271/272 obligations such as 271 checklist items, but it insists that it is neither appropriate nor lawful to address the provisioning of 271 offerings in 251/252

² AT&T GTC DPL § 1.1 p. 1.

negotiations and arbitrations.³ "271 is not part of 252. It's not referenced in 252. It's not referenced in 251."⁴

7. AT&T proposes language that would specifically reference § 271, "The parties intend that the obligations of SBC Kansas set forth in this Agreement are those required of SBC Kansas pursuant to the Act, including Sections 251 and 271, and applicable State law."⁵

8. The CLEC Coalition proposes to revise some of the "whereas" clauses to memorialize 271 comments in the successor agreement to the K2A:

Whereas, the Kansas Corporation Commission ("KCC", "Commission", or "Kansas Commission") recommended approval of SBC KANSAS'S (sic) application for 271 relief, based in large part on the existence of the Kansas 271 Agreement ("K2A"); and,

Whereas, SBC Kansas agreed to file in Kansas an (sic) Kansas 271 Interconnection Agreement ("Kansas Agreement" or "K2A") modeled on the Texas 271 Interconnection Agreement ("Texas Agreement" or "T2A"), in order to bring more of the benefits of competition to the State of Kansas, and to bring the commitments made by SBC Texas in Texas to the State of Kansas, with Kansas-specific modifications, subject to the Commission's support for SBC KANSAS'S (sic) application for in-region interLATA relief for the State of Kansas; and,

Whereas, in Texas SBC Texas made the following representations as part of the public interest phase of the Texas collaborative process and SBC KANSAS made these same representations in Kansas, which the Commission finds still to be necessary for SBC KANSAS'S (sic) 271 Relief to remain in the public interest. . .⁶

³ SWBT Silver Direct p.13 lines 11 - 20.

⁴SWBT Silver Tr. Vol. 1 p. 69 lines 21 - 22.

⁵ AT&T GTC DPL § 1.1 p. 1.

⁶ CLEC Coalition GTC DPL p. 1

In short, the CLEC Coalition wants all of the promises and commitments made by SWBT during its 271 proceedings, and embodied in the K2A, to be preserved in the successor agreement. The CLEC Coalition is of the opinion that those promises and commitments were not limited to the three-year term of the K2A, but are on-going.⁷ Indeed, the CLEC Coalition insists that removing all references to SWBT's 271 commitments will deprive CLECs of their contractual rights to complain to the Commission of any SWBT failure to fulfill any of those "ongoing commitments".⁸ The Coalition also suggests that these promises and commitments provide important checks and balances, serving as an incentive for SWBT to treat CLECs as business partners rather than unwanted competitors.⁹

9. SWBT agrees that it made many commitments during its Kansas 271 proceedings. However, SWBT contends that those commitments were above and beyond SWBT's obligations under either § 251 or § 271. SWBT also prefers to reach agreement on non-251 issues in commercial agreements. Once such issues are incorporated into an interconnection agreement, the probability of arbitrations increases.¹⁰

Determination.

10. The Arbitrator finds SWBT's proposed language to be consistent with the provisions of the Act and FCC rules. Section 251 unbundling obligations are independent of SWBT's § 271 unbundling obligations. While SWBT may be relieved of certain § 251 unbundling obligations, it will still be obligated to unbundle certain network

⁷ CLEC Coalition Joint Direct p. 12 lines 1 - 9.

⁸ CLEC Coalition Post-Hearing Brief p. 9.

⁹ *Id.* p. 13 lines 23 - 26.

¹⁰ SWBT Chapman Tr. Vol. 1 p. 71 line 19 - p. 72 line 24.

elements under § 271. Section 251 UNEs are priced at the total element long run incremental cost (TELRIC) methodology¹¹, whereas § 271 UNEs are priced at market rates.¹² Due to the independent nature of § 251 obligations *vis-à-vis* § 271 obligations, the Arbitrator finds that SWBT is not required to meld § 271 into § 251 arbitrations. The "contractual rights" cited by the CLEC Coalition are like any other contractual rights--they cease upon the expiration of the contract, in this case on February 16, 2005.¹³ AT&T cites *Coserv*, stating that the "Fifth Circuit reversed a state commission's reasoning for refusing to arbitrate an issue in these circumstances."¹⁴ AT&T is incorrect in this regard. In fact, the *Coserv* Court, affirmed, not reversed, stating, "While the PUC erred in its interpretation of the compulsory arbitration provision, its ultimate refusal to arbitrate the compensated access issue was correct, because compensated access was not a mutually agreed upon subject of voluntary negotiation between SWBT and Coserv." *Id.*, 488.

¹¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (*Local Competition First Report and Order*) 15515, par. 29.

¹² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*), 3906 par. 473.

¹³ The Arbitrator is aware that SWBT maintains that it "did not voluntarily negotiate any issues relating to the inclusion of Section 271 obligations in the successor ICA" thereby invoking the restriction of issues to compulsory arbitration articulated in *CoServ, LLC v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003) (*Coserv*). The Arbitrator is also aware that the CLEC Coalition disagrees that SWBT did not voluntarily negotiate the 271 issue. CLEC Coalition Joint Direct p. 16 lines 9 - 16. The Arbitrator finds that he does not need to resolve this quarrel because of his determination of the interconnection agreement language proposed by SWBT, AT&T and the CLEC Coalition.

¹⁴ AT&T Post-Hearing Brief p. 5.

Additional AT&T (1) issue--other ILEC connection

11. AT&T proposes language that, in those areas where SWBT has extended its network outside its ILEC territory, would enable AT&T to access this network.¹⁵ According to AT&T, this issue relates to AT&T's right to interconnect with SWBT through another ILEC's tandem switch in a LATA where SBC does not have a tandem.¹⁶

Determination.

12. AT&T's proposed language is not consistent with the Act. Section 251(c)(2) requires an incumbent local exchange carrier, such as SWBT, "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the *local exchange carrier's network*" (emphasis added). Another ILEC's tandem switch is not part of SWBT's local network. The Arbitrator adopts SWBT's language.

General Terms and Conditions--"end user"

CLEC Coalition GTC-5 and GTC-58; Joint Petitioners GTC-25 and GTC-41; Birch/Ionex GTC-49

13. The CLECs object to the use and definition of "End User" by SWBT. According to the CLECs, use of "End User" would preclude them from offering telecommunications services to wholesale customers such as other telecommunications companies and internet service providers (ISPs) as they do now. The CLECs claim that there are no provisions in the Act or in FCC rules that would prevent them from providing telecommunications services to wholesale customers. The CLECs also claim the limitations that "End User" would impose would be discriminatory because SWBT

¹⁵AT&T GTC DPL §1(a) pp. 1 - 2.

¹⁶AT&T Cederqvist Direct p. 3 line 22 - p. 4 line 2.

serves both retail and wholesale customers.¹⁷ The CLECs also note that if SWBT's use of "End User" is intended to prohibit resale of UNEs to other carriers, SWBT has not taken a targeted approach in this regard.

14. SWBT believes that a definition of "End User" is necessary because that term is used throughout the proposed K2A successor agreement. SWBT cites several FCC orders for support of the use of "End User": (1) *First Report and Order* ¶ 995 for the proposition that UNEs are available only for "the provision of telecommunications service and that, for instance, information services may be provided over the UNEs if the provider has first obtained the UNE under Section 251(c)(3) to provide telecommunications service" and (2) *UNE Remand Order* ¶ 480 for the proposition that the "FCC declined to require unbundling of the portions of the local network used to connect a LEC's serving wire center with an IXC's point of presence, known as 'entrance facilities' for purposes of providing existing access service, noting that such an obligation 'could cause a significant reduction of the incumbent LEC's special access revenues prior to full implementation of access charge and universal service reform.'"¹⁸

Determination.

15. The reason that "End User" appears throughout the proposed K2A successor agreement is because SWBT has injected that term into the language with great frequency. Further, ¶ 995 of the *First Report and Order* does not stand for the proposition urged by SWBT and the quoted language cannot be found in that paragraph. In similar fashion, ¶ 489 of the *UNE Remand Order* does not stand for the proposition advanced by SWBT. The FCC did not decline to require certain unbundling associated

¹⁷ CLEC Coalition Joint Direct p. 21 line 9 - p. 24 line 3.

¹⁸ SWBT Smith Direct p. 7 lines 1 – 21.

with "entrance facilities". In fact, the FCC concluded that the record in this regard was insufficient to determine whether its rules should apply to "entrance facilities" and requested further comment on this matter. The Arbitrator finds SWBT's testimony unreliable and concludes that the CLECs' position should be adopted.

General Terms and Conditions--omitted prices

AT&T GTC-7

16. AT&T submits that if it orders products or services not addressed by the K2A successor agreement, or if rates for a product or service have been inadvertently omitted from the K2A successor agreement, SWBT and AT&T should negotiate appropriate terms and conditions. In the alternative, AT&T should be able to order the product or service out of a tariff under the applicable terms and conditions contained in the attendant tariff.¹⁹ AT&T believes that SWBT agrees, at least to the degree of negotiations.²⁰

17. SWBT contends that AT&T should not be able to pick and choose between its interconnection agreement and SWBT's tariff where such product or service is already available from AT&T's interconnection agreement.²¹

Determination.

18. SWBT appears to miss the point here. AT&T's premise is that the product or service is not available from, or priced in, the interconnection agreement. The Arbitrator adopts AT&T's language.

¹⁹ AT&T Cederqvist Direct p. 7 line 1 - p. 8 line 20; Tr. Vol. 1 p. 205 line 10 - p. 206 line 13.

²⁰ AT&T Post-Hearing Brief p. 6.

²¹ SWBT Quate Rebuttal p. 5 line 6 - p. 6 line 2. N.B. Ms. Quate's rebuttal testimony is denominated as "Direct Testimony".

General Terms and Conditions--"TBD" rates

AT&T GTC-8

19. In the event that a rate in the K2A successor agreement is marked "to be determined" or "TBD", AT&T believes that the applicable rate should be established in accordance with § 4.1.1 of the agreement. AT&T readily agrees that if it orders the product or service with a TBD designation, it should pay the finally determined rate for the period of time that it uses the product or service. But, AT&T is adamantly opposed to permitting SWBT to unilaterally establish the rate at a later date.²²

20. SWBT disagrees, stating that § 4.1.1 addresses rates modified by a Commission ruling, not when a rate for a product or service is marked "TBD". Further, SWBT believes that once a rate is determined, the agreement should be amended and the established rate be applied retroactively.²³

Determination.

21. Section 4.1.1 of the proposed agreement is not reserved only for Commission-determined rates. It also applies to a separately executed agreement of the parties. Allowing SWBT to unilaterally determine the rate at a later date is overbearing. The Arbitrator, therefore, adopts AT&T's language.

General Terms and Conditions--assignment

AT&T GTC-10; Navigator GTC-8

22. Both Navigator and AT&T want the assignment or transfer restrictions to be reciprocal; that is, CLEC obligations in the assignment or transfer of the interconnection agreement should be no greater than SWBT obligations in the assignment or transfer of

²² AT&T Cederqvist Direct p. 11; Rebuttal p. 15 line 1 - p.16 line 8.

²³ SWBT Quate Rebuttal p. 7 line 1 - p. 8 line 3.

its rights and obligations under the interconnection agreement. Navigator does not believe that it should be prevented from assigning its rights and obligations under the agreement to an affiliate. Navigator contends that SWBT's concerns of arbitrage--an affiliate trading out a less favorable agreement for Navigator's agreement--is much overplayed. Navigator is concerned that restrictions such as those proposed by SWBT could hamper acquisitions of one CLEC by another.²⁴ AT&T is opposed to SWBT's requirement that an assignee must be "certificated" before an assignment can be completed because this might foreclose AT&T from using third-parties to help provide facilities-based services to end users.²⁵ However, during the arbitration hearings, AT&T advised the Arbitrator that it and SWBT had settled this issue except for the reciprocity piece.²⁶

23. SWBT contends that assignment obligations should not be reciprocal because it is subject to greater regulatory scrutiny and any proposed assignment or transfer would be extensively investigated.²⁷

Determination.

24. Parity for parity's sake is not necessarily the correct solution. SWBT is correct; it is much more extensively regulated than the CLECs. Any proposal by SWBT to assign or transfer its business to another carrier would be intensely scrutinized by the Commission. The Arbitrator, therefore, adopts SWBT's language of § 5.1.1. However, SWBT's ability to void a transaction by affiliates in § 5.12 is overreaching, especially

²⁴ Navigator LeDoux Direct p. 12 line 6 - p. 13 line 2.

²⁵ AT&T Cederqvist Direct p. 12 line 7 - p. 14 line 4.

²⁶ Tr. Vol. 1 p. 228 line 22 - p. 229 line 4.

²⁷ SWBT Quate Direct p. 16 line 5 - p. 17 line 11.

when a CLEC may opt into another CLEC's interconnection agreement as long as the entire agreement is adopted. The Arbitrator, therefore, adopts Navigator's position in this regard.

General Terms and Conditions--damages

AT&T GTC-12; CLEC Coalition GTC-12; Joint Petitioners GTC-5

25. AT&T disagrees with SWBT's attempt to cap its liability for providing sub-standard service at the price of the service. For instance, if SWBT provided AT&T a non-working loop, damages would be capped at the recurring price of the loop, less than \$20.00. AT&T believes that such minimal pay-out encourages SWBT to provide less than stellar service. AT&T proposes two exclusions from the cap--one for performance remedies and the other for remedies specifically provided in the successor interconnection agreement. If SWBT's sub-standard service is covered by the performance measure plan, then the terms of the plan prevail; but, in no event should the remedies under the plan be subject to the 7.1.2 cap (price of the service). If the situation is not controlled by the plan, and the interconnection agreement does not provide specific remedies, then AT&T would have a breach of contract claim subject to the cap.²⁸

26. The CLEC Coalition agrees with AT&T that minimal penalties incurred by SWBT for sub-standard performance creates an economic incentive for SWBT not to perform up to standards. The CLEC Coalition proposes language that does not cap performance measurement penalties.²⁹ Because it is primarily seeking recovery of

²⁸ AT&T Cederqvist Rebuttal p. 22 line 16 - p. 27 line 7.

²⁹ CLEC Coalition Joint Direct p. 32 line 13 - p. 33 line 19.

damages not addressed by the Performance Measures, the CLEC Coalition suggests that determination of this damage issue be deferred until Phase 2 of these proceedings.³⁰

27. The Joint Petitioners are a bit more aggressive, seeking three times the average monthly amount billed by SWBT to a CLEC when a customer provides the CLEC in excess of \$5,000 in monthly billings when that customer is out-of-service for four hours or more due to the actions or omissions of SWBT.³¹

28. SWBT believes the CLECs are amply protected by indemnification provisions, liquidated damages under the performance measurements and remedies available under the dispute resolution process. SWBT contends that, if it should be subject to the CLECs' proposed damage provisions, its rates would need to be re-examined in light of this new, significant exposure to damages.³²

Determination.

29. There is no evidence in the record to support the CLECs need for availability for increased damage amounts for sub-standard performance by SWBT. The Arbitrator, therefore, adopts the language of SWBT.

General Terms and Conditions--receipt of bills

CLEC Coalition GTC-15 (a & b); Joint Petitioners GTC-6 (a & b)

30. The CLEC Coalition complains that the bills from SWBT are customarily received 10 to 15 days after the bill date. Xspedius, for example, receives its bills,

³⁰ CLEC Coalition Post-Hearing Brief p. 42.

³¹ Joint Petitioners GTC DPL § 7.1.6 p. 11.

³² SWBT Pellerin Direct p. 3 line 6 - p. 6 line 13.

on the average, 16 days after bill date³³ while Birch, over a two-year period, received electronic invoices on an average of seven to nine days after the bill date and received paper invoices on an average of seven to 13 days after the bill date. SWBT demands payment within 30 days of the bill date.³⁴ Typically, it takes 30 days to audit a bill from SWBT.³⁵ The due date is critical because escrow, deposit requirements and determinations of breach are tied to the due date. Although the CLEC Coalition originally proposed a bill due date of 45 days from the receipt of the bill, it is willing to compromise as long as it has 30 days to review the bills for errors.³⁶

31. The Joint Petitioners have experienced similar instances of bills arriving ten days after bill date, which does not provide the CLEC sufficient time to review its bill. The Joint Petitioners propose a due date of 35 days after receipt of the bill from SWBT.³⁷

32. SWBT believes that if the CLECs have 30 days to review their bill that is sufficient time to audit their bills.³⁸

Determination.

33. The problem for the CLECs is that they never have 30 days from the bill date in which to audit their bills. SWBT has a commitment to "get the bills out within 6 work days" after the bill date.³⁹ The Arbitrator finds that the CLECs require more time to audit their bills from SWBT than what is afforded them under the current billing procedure.

³³ CLEC Coalition Joint Direct p. 33 line 21 - p. 34 line 12.

³⁴ Birch Wallace Direct p. 9 line 1 - 9.

³⁵ Tr. Vol. 1 p. 121 line 14 - 24.

³⁶ CLEC Coalition Joint Direct p. 35 line 23 - 25.

³⁷ Joint Petitioners Schmick Direct p. 5 line 20 - p. 6 line 22.

³⁸ SWBT Quate Tr. Vol. 1 p. 126 line 23 - 25.

³⁹ SWBT Read Tr. Vol. 1 p. 142 line 3 - 5.

However, pegging a bill due date based upon receipt of the bill is not dependable and is fraught with possible disputes. The Arbitrator, therefore, concludes that CLECs shall have 45 days after the bill date by which time payment must be received by SWBT.

General Terms and Conditions--invoice medium

Joint Petitioners GTC-7

34. The Joint Petitioners want all invoices in electronic form as well as in paper form, dependent upon CLEC request, because electronic versions are physically more manageable than boxes of paper.⁴⁰

35. SWBT advises that most, but not all, of its bills can be received in electronic form, with paper copies available upon request.⁴¹

Determination.

36. There appears to be little value of requiring SWBT to produce bills in electronic versions when they are, for the most part, already available, and paper copies are available upon request. The Arbitrator adopts SWBT's position.

General Terms and Conditions--billing dispute form

Joint Petitioners GTC-8(a)

37. The Joint Petitioners report that SWBT requires CLECs to use a prescribed form when submitting billing disputes. The form requires, among other things, an account identifier, bill date and end user account information. Although the Joint Petitions admit that, in many cases, there are no problems in following SWBT's procedure, they do not believe the forms are that useful in all situations. For example, if SWBT incorrectly bills each telephone line on a CLEC's account for several months,

⁴⁰ Joint Petitioners Schmick Direct p. 8 line 16 - p. 9 line 13.

⁴¹ SWBT Quate Direct p. 25 lines 7 - 21.

there may be thousands of identical small overcharges. According to the Joint Petitioners, the CLEC must submit separate forms for each line incorrectly billed. In addition, the forms are rejected by SWBT for the slightest error. The Joint Petitioners also report that Verizon in Texas recently agreed to provide the sort of process recommended by the Joint Petitioners--acceptance of CLEC written notice when a form is inadequate and a single dispute report for the same pervasive error. If Verizon is able to accommodate the CLECs in this manner, the Joint Petitioners believe SWBT should be able to do so also.⁴² The Joint Petitioners suggest the following additional language to the proposed interconnection agreement at § 8.4.1.1:

Written notice that substantially meets the foregoing requirements [bill date, BAN number, etc.] will be deemed sufficient regardless of whether such notice is made on an SBC-prescribed form. Furthermore, such written notice will not be deemed insufficient for failure to provide specific details such as telephone numbers where the bill does not allow ready identification of such details.⁴³

38. SWBT counters that the dispute form was established to better process disputes because CLECs were submitting a variety of forms, such as spreadsheets, to dispute their bills. With respect to "pervasive" errors, SWBT had announced in an accessible letter that a CLEC could complete certain required information just once and add the months in dispute in the appropriate dispute column. Concerning the complaint that the form changes, SWBT advised that most changes come at CLEC request.⁴⁴

⁴² Joint Petitioners Schmick Direct P. 9 line 14 - p. 12 line 5.

⁴³ Joint Petitioners GTC DPL § 8.4.1.1 p. 17.

⁴⁴ SWBT Christensen Rebuttal p. 2 line 8 - p. 6 line 9.

Determination.

39. The Arbitrator finds that SWBT appears to be trying to accommodate CLEC requests in the design of the dispute form. Accuracy is required in the completion of any form. The Arbitrator is concerned that adoption of the Joint Petitioners' interconnection agreement language would result in a myriad of paper and electronic vehicles by which CLECs would file billing disputes. The Arbitrator believes that billing dispute resolution as a whole would grind to an unacceptable, slow pace using the Joint Petitioners' language. The Arbitrator, therefore, adopts SWBT's proposed language which, for CLEC information, states that the standard dispute form will be used *unless otherwise agreed*.

General Terms and Conditions--back-billing

CLEC Coalition GTC-16; Joint Petitioners GTC-8(b)

40. The CLEC Coalition proposes that the availability of back-billing be restricted to six months from the date an error in billing is discovered by one party and noticed to the other. The CLEC Coalition favors this shorter period because it is about the maximum amount of time that a CLEC can hope to back-bill and collect from its customers.⁴⁵

41. The Joint Petitioners suggest a 12-month back-billing window. If it is SWBT which is back-billing, SWBT needs to identify back charges as such and separately from the current charges; otherwise, billing disputes may arise because the CLEC was not aware of the back-billing.⁴⁶

42. SWBT favored a 12-month back-billing window. SWBT explained that CLEC billing is produced from the same billing systems that provide bills for all

⁴⁵ CLEC Coalition Joint Direct p. 38 line 22 - p. 39 line 2.

⁴⁶ Joint Petitioners Schmick Direct p. 13 line 6 - p. 15 line 11.

customers of SWBT in Kansas. The term "back-billed" is not programmed as a phrase code in the billing system. Back-billing, then, cannot be set out separately on CLEC bills and it would be expensive and time-consuming to make that change. However, SWBT will provide a spreadsheet detailing the back-billing upon request.⁴⁷

Determination.

43. Based upon the recommendations and testimony of the parties, the Arbitrator finds that parties are permitted a 12-month back-billing window. To the extent that SWBT can separately identify back charges on a bill, the Arbitrator finds that it should do so. In all other regards, the Arbitrator finds that the record evidence supports SWBT's position and the Arbitrator, therefore, adopts SWBT's proposed language.

General Terms and Conditions--deposit/escrow

CLEC Coalition GTC-8, 15(c); Joint Petitioners GTC-8(c), 9; Navigator GTC- 3, 4

44. The CLEC Coalition accepts the notion that SWBT is entitled to request a deposit from a CLEC, but only under limited circumstances and at an amount that would not exceed two months of billings to the CLEC by SWBT. The CLEC Coalition believes that it should be the CLEC's choice to provide the deposit amount in cash or irrevocable letter of credit as SWBT is protected equally well with either assurance device. The CLEC Coalition is concerned about SWBT's ability to call in the deposit if, in "SWBT's reasonable judgment"⁴⁸, the CLEC's credit worthiness is impaired. The CLEC Coalition

⁴⁷ SWBT Quate Direct p. 26 line 16 - p. 28 line 2; Rebuttal p. 17 line 6 - p. 18 line 5.

⁴⁸ CLEC Coalition GTC DPL § 3.2.2 p. 19, SWBT language.

notes that SWBT did not quantify any losses that it might have suffered with the 180 CLECs that ceased conducting business since 2000 throughout SWBT's 13-state region.⁴⁹

45. With respect to SWBT's proposal to require CLECs to escrow an amount equal to the amount of a bill being disputed, the CLEC Coalition points to the poor quality of SWBT's bills. For instance, Birch Telecom lodged over 1,000 billing disputes in Kansas in 2004 totaling \$500,000. Birch noted that 80% of its disputes with SWBT-Kansas and other SBC ILECs are decided in its favor. Birch claims that CLECs generally do not have sufficient financial resources to fund SWBT's billing errors. The CLEC Coalition recommends that escrows not be required until SWBT improves its billing systems.⁵⁰

46. The Joint Petitioners propose a standard deposit of \$17,000 and do not believe that a single missed payment should trigger invocation of a deposit equal to three months of billing.⁵¹

47. The Joint Petitioners also oppose SWBT's ability to require the billing dispute amount to be escrowed. They propose that no escrow be required if the CLEC disputing a bill (a) does not have a proven history of late payments and has established a minimum of six months good credit history with SWBT or (b) if more that 50 percent of the billing disputes lodged by the CLEC during the most recent 12-month period are determined in the CLEC's favor.⁵²

⁴⁹ CLEC Coalition Joint Direct p. 28 line 16 - p. 30 line 9; Rebuttal p. 14 line 18 - p. 16 line 15.

⁵⁰ CELC Coalition Wallace Direct p. 10 line 16 - p. 11 line 25.

⁵¹ Joint Petitioners Schaub Direct p. 6 line 4 - p. 7 line 3.

⁵² Joint Petitioners GTC DPL § 8.7 p. 22.

48. Xspedius and SWBT appear to be in a billing dispute. Xspedius admits to owing SWBT \$172,000 in undisputed amounts under its interconnection agreement, but claims that SWBT owes Xspedius approximately \$1.9 million. Xspedius proposes that any time that SWBT owes Xspedius more than one month's worth of Xspedius billings, a deposit by Xspedius will not be required.⁵³

49. Navigator believes that SWBT's potential financial exposure for unpaid charges of a CLEC is one month's worth of billing. Navigator is concerned about SWBT's ability to invoke its deposit requirement upon a CLEC's failure to pay even the smallest of bills.⁵⁴ Navigator also objects to SWBT's proposed ability to require escrow of the disputed amount of a bill. Navigator claims that, since beginning business in 1997, it has filed numerous billing disputes over some aspect of SWBT's bills. Because the resolution of these disputes may take one to one and a half years, Navigator is concerned with the large amount of cash that would be tied up if Navigator is forced to provide escrow.

50. SWBT's criterion for establishing satisfactory credit is 12 consecutive months of timely payments to SWBT.⁵⁵ However, during the hearings, SWBT revised its criterion to a CLEC's credit history with SBC as a whole, saying that "deposits should not be state-specific."⁵⁶ Ms. Quate continued in her direct testimony, that SWBT's proposed triggers for determining impaired creditworthiness were based on concrete, clearly defined and objective criteria such as investment grade credit ratings and failure to timely

⁵³ CLEC Coalition Joint Direct p. 54 line 2 - p. 55 line 26.

⁵⁴ Navigator LeDoux Direct p. 8 line 22 - p. 10 line 9.

⁵⁵ SWBT Quate Direct p. 47 lines 18 - 26.

⁵⁶ SWBT Quate Tr. Vol. 1 p. 148 lines 11 - 14.

pay a bill. SWBT reports that the Michigan Public Service Commission approved the exact same language proposed here in its arbitration proceedings between SBC Michigan and MCI.⁵⁷

51. SWBT claims that the escrow requirement in billing disputes is necessary because some CLECs, such as Delta Phones, Inc., have been known to "game the system" by challenging bills just to extend their time for payment. However, SWBT is willing to waive escrow for "customers with good credit histories and who have not filed a large number of disputes that were resolved in SWBT's favor" and where there has been a material billing error. Otherwise, SWBT expects the disputed amount to be escrowed by the CLEC prior to the bill due date.⁵⁸

Determination.

52. The Arbitrator finds for the CLECs with respect to deposits. SWBT's proposal that it be permitted to use its "reasonable judgment" to determine if a CLEC's creditworthiness has been impaired is entirely too vague and subjective to provide CLECs with proper notice of when they become credit-unworthy. Furthermore, imposition of a deposit upon a previously creditworthy CLEC due to failure to pay some unquantified level of bill may be so out of balance and so vague as to be unacceptable in any corner of any market. The Arbitrator also disagrees with SWBT that the claim of Xspedius is a red herring that should be determined elsewhere. The Arbitrator finds that Xspedius' testimony is on point. If its position is accurate, requiring a deposit of Xspedius would be extremely unfair.

⁵⁷ SWBT Quote Direct p. 47 lines 5-12.

⁵⁸ SWBT Post-Hearing Brief p. 41.

53. The Arbitrator also finds for the CLECs with respect to the SWBT-proposed requirement for escrow of an amount equal to the amount disputed on a bill. The record is strewn with claims of inaccurate SWBT bills. The percentage of disputes that the CLECs maintain are found in their favor were unopposed by SWBT. The evidence in these proceedings of sub-standard quality billing by SWBT stands in sharp contrast to SWBT's belief that "it rarely makes billing errors."⁵⁹ Considering the number of billing disputes lodged by the CLECs, the standard of four or more losses of disputes in the previous twelve months is unbalanced and unfair.

General Terms and Conditions—assignment of dispute costs

Joint Petitioners GTC-10, 12

54. The Joint Petitioners proposes language that would permit them to recover the costs of processing disputes over incorrect billing from SWBT. In similar fashion, the Joint Petitioners want to be able to recover their costs from SWBT when SWBT technicians mistakenly ascribe the cause of a network problem to the CLEC's network.⁶⁰

55. SWBT objects because the proposed language is not mutual; the costs and expenses are too difficult to quantify and it is customary for each side to pay its own expenses in disputes.⁶¹

Determination.

56. The Arbitrator rejects the Joint Petitioners' proposal to recover processing disputes costs because it makes no distinction whether the CLEC must prevail or not.

⁵⁹ SWBT Quate Direct p. 31 line 8.

⁶⁰ Joint Petitioners Schaub Direct p. 7 line 4 - p. 8 line 19; Schmick p. 18 line 6 - p. 20 line 17.

⁶¹ SWBT Post-Hearing Brief ¶¶ 94 -97.

With respect to both recovery proposals, the record evidence does not support the imposition of these costs upon SWBT.

General Terms and Conditions--dispute resolution

CLEC Coalition GTC – 19, 48

57. The CLEC Coalition proposes that the non-initiating party in a dispute shall have five days to designate its own representative.⁶² The CLEC Coalition claims that SWBT's current uniform procedures are slow and cumbersome and tend to stretch out simple dispute resolutions to 30 to 60 days. The CLEC Coalition, therefore, proposes a process by which "customer-affecting" disputes may be resolved in quicker fashion.⁶³ It also opposes SWBT's proposal that "for settlement purposes" apply to discussions and correspondence related to settlement endeavors. Finally, the CLEC Coalition proposes to establish an Escalation Process up to the Vice President level.

58. Concerning the five-day limitation for designating representatives in non-billing disputes, SWBT says that it disagrees⁶⁴ but it does agree that dispute resolutions should be included in the interconnection agreement.⁶⁵ It believes that any settlement discussions and correspondence should be exempt from subsequent discovery settlement just as settlement offers are exempt.⁶⁶ SWBT also opposes the CLEC Coalition's proposal for an escalated dispute process.⁶⁷

⁶² CLEC Coalition GTC DPL § 13.31 p. 65.

⁶³ CLEC Coalition Joint Direct p. 40.

⁶⁴ SWBT Post-Hearing Brief ¶ 98.

⁶⁵ *Id.* ¶ 99.

⁶⁶ SWBT Quate Direct p. 34 lines 6 - 18.

⁶⁷ SWBT Quate Rebuttal p. 21 lines 5 - 13.

Determination.

59. Because the record is virtually barren of any evidence about the reason for the five-day period within which the parties must designate representatives for dispute resolution, the Arbitrator declines to rule upon the proposal. If, contrary to the Arbitrator's impression, the issue is significant, the Arbitrator directs the parties to further negotiate the matter to resolution. The CLEC Coalition's own proposed language calls for resolution within 60 days⁶⁸ which argues against its complaint, that resolution under SWBT's process takes 30 to 60 days. The CLEC Coalition's argument here must be disregarded. SWBT's proposed language for informal resolution of disputes is reasonable and appears to lead to a more informative position of the parties than does the CLEC Coalition proposal. On the other hand, SWBT's proposal to declare discussions and correspondence among the representatives for purposes of settlement as exempt from subsequent discovery is overbearing and is hereby stricken. If the parties are unable to reach agreement in the informal resolution process and the matter is subsequently arbitrated or is associated with a civil action, vital information may be unavailable for the decision-maker if SWBT's proposal is adopted. Therefore, in these informal resolution meetings, only settlement offers are deemed exempt from subsequent discovery absent agreement among the parties. Finally, the Arbitrator agrees with SWBT that the CLEC Coalition's proposal for an escalated resolution is heaping one resolution process upon another. Furthermore, availability to access an escalated process may incent a party to the other issue resolution processes not to work for resolution as hard as it might without

⁶⁸ CLEC Coalition GTC DPL § 13.3.1 p. 65.

that availability. The need for an escalated process is also diminished with SWBT's assurance that a CLEC may call a SWBT vice president to press for resolution.⁶⁹

General Terms and Conditions--termination of service

AT&T GTC-13(a), 14; CLEC Coalition GTC-21; Joint Petitioners GTC-13

60. AT&T proposes language that, should it fail to pay SWBT upon second notice, SWBT may refuse new orders and discontinue services but only to the extent that Interconnection is not impacted.⁷⁰ AT&T maintains that this protection is needed so that its customers are not suddenly left without dialtone.

61. The CLEC Coalition suggests that SWBT issue a single disconnect notice 15 days after the billing due date. The CLECs would then have 15 days from receipt of that notice to pay the bills.⁷¹

62. The Joint Petitioners recommend that if The Pager and Phone Company or Prairie Stream Communications, Inc. files a billing dispute and seeks interim relief from the Commission, SWBT may not disconnect until after the Commission issues a final order on the matter. To permit SWBT to disconnect prior to this time would be to assume that SWBT's bills are correct.⁷²

63. SWBT explains that it sends a collection letter any time there are past due amounts owing. That letter provides a ten-day window within which the CLEC must pay the undisputed amount of the bill. If the CLEC does not meet the requirements set out in the collection letter, SWBT would send a second letter providing the CLEC with five

⁶⁹ SWBT Christensen Tr. Vol. 1 p. 136 lines 5 - 19.

⁷⁰ AT&T GTC DPL § 10.5.2 p. 20.

⁷¹ CLEC Coalition Joint Direct p. 43 - p. 44 line 9.

⁷² Joint Petitioners Schaub Direct p. 8 line 20 - p. 9 line 21.

days to pay. During this five-day period, SWBT would be entitled not to process any new orders and, when the five days are gone, SWBT could disconnect.⁷³ SWBT also advises that disconnect would only occur in those instances in which undisputed billing amounts are not paid. Where there are good faith billing disputes in process, the CLEC will not be disconnected. SWBT notes that a CLEC could always file an expedited request under K.A.R. 82-1-220a with the Commission requesting stay of the disconnect. SWBT is concerned that adopting the CLECs' proposals would force upon SWBT greater financial risks that it should not be obligated to assume.⁷⁴

Determination.

64. The CLEC Coalition's proposal has been accepted by SWBT.⁷⁵ With respect to the other disconnect issues, the Arbitrator finds SWBT's proposal to be more reasonable than those of the CLECs. It provides a clear time-frame within which a CLEC must complete certain transactions. (Of course, SWBT's time periods must be consistent with the Arbitrator's earlier decisions, especially those that relate to the CLEC's ability to pay within 45 days of SWBT's bill date.) The Arbitrator agrees with SWBT that it should not be placed in a position in which it must continue to provide services to a delinquent CLEC while it waits for a Commission determination.

⁷³ SWBT Quate Direct p. 36 line 7 - p. 42 line 12.

⁷⁴ SWBT Post-Hearing Brief ¶¶ 104 - 110.

⁷⁵ Tr. Vol. 1 p. 188 line 20 - p. 189 line 7.

General Terms and Conditions--ICA/tariff

AT&T GTC-15

65. AT&T proposes that it be able to order products and services in accordance with its interconnection agreement and, at the same time, order products and services out of SWBT's tariff. AT&T believes that would advance public policy.⁷⁶

66. SWBT explains that it does not have separate USOCs for the same product. Thus, its billing system cannot bill for the same product to the same CLEC at two different rates.⁷⁷

Determination:

67. Because AT&T did not challenge SWBT's USOC limitation, the Arbitrator must adopt SWBT's language.

General Terms and Conditions--tariff advisory

CLEC Coalition GTC-32, 37; Joint Petitioners GTC-14

68. The CLEC Coalition wants to continue with the K2A practice that SWBT must advise CLECs by advanced written notice of any tariff or other filing that concerns the subject matters of the interconnection agreement. The CLEC Coalition observes that the notice process is currently in place and there does not appear to be any reason to shut it down.⁷⁸ Concerning the matter of complying with Telcordia standards and Network Security Plan, the CLEC Coalition ensures the Arbitrator that it does not object to complying with the standards but does object to the fact that the CLECs are expected to comply without a copy of those standards.

⁷⁶ AT&T Cederqvist Direct p. 21 line 23 - p. 24 line 11.

⁷⁷ SWBT Quate Rebuttal p. 9 lines 4 - 25.

⁷⁸ CLEC Coalition Joint Rebuttal p. 31 line 22 - p. 32 line 20.

69. SWBT wants to follow Commission rules in the notice of a tariff filing.⁷⁹ With respect to the Telcordia handbook, SWBT does not believe that it should be obligated to purchase it for the CLECs when it is publicly available.⁸⁰

Determination.

70. SWBT fails to explain the reason that it would take this apparently helpful tariff notice down after providing it for the past several years. If the CLECs are as important to SWBT as portrayed during the hearings⁸¹, then SWBT should continue providing CLECs with tariff notices as it did before. The record evidence does not support SWBT's claim that it would be administratively burdensome and expensive to provide the CLECs notice in accordance with each interconnection agreement.⁸² On the other hand, the Arbitrator finds that SWBT does not need to provide the Telcordia handbook to the CLECs; rather, that is the responsibility of the CLECs.

General Terms and Conditions—environmental indemnification

AT&T GTC-17; Joint Petitioners GTC-30

71. AT&T proposes that SWBT indemnify AT&T for environmental hazards created by a third party at a SWBT work location.⁸³

72. SWBT opposes executing an indemnification for environmental damages that existed prior to the date of the agreement. Further, SWBT states it cannot indemnify AT&T for conditions that may have been caused by AT&T or other CLECs.⁸⁴

⁷⁹ SWBT Quate Direct p. 58 lines 20 - 21.

⁸⁰ SWBT Post-Hearing Brief ¶ 118.

⁸¹ "So we have a lot more incentive to work with the CLECS as our customers to keep them on our network. . ." Tr. Vol. 1 p. 99 lines 16 - 18.

⁸² SWBT Quate Direct p. 59 lines 2 - 4.

⁸³ AT&T Cederqvist Direct p. 22 line 15 - p. 24.

Determination.

73. The Arbitrator finds that SWBT's proposed language--that the party that caused the damage should be liable for it--is more reasonable than AT&T's proposal.

General Terms and Conditions--disclaimer of warranties

Joint Petitioners GTC - 37

74. The Joint Petitioners adopted the AT&T language.⁸⁵

75. SWBT claims that the proposed language of both the CLEC Coalition and the Joint Petitioners imply there are warranties in the Act, which there are not. SWBT maintains that its proposed language is designed specifically to prevent CLEC interpretation that SWBT is providing a warranty for its products or services.⁸⁶

Determination.

76. There is very little distinction between the two language proposals. Because SWBT was specific about the purpose of its proposed language, the Arbitrator finds that it should be adopted.

General Terms and Conditions--term

Joint Petitioners GTC-2

77. The Joint Petitioners suggest that the term of their interconnection agreement be seven years so that they may avoid the frequent disruption to their business that negotiations and arbitration of new agreements cause. The Joint Petitioners believe that the uncertainty and tension that is associated with the negotiations interferes with access to equity financing. The Joint Petitioners also believe that putting SWBT's

⁸⁴ AT&T GTC DPL § 40.4.3 pp. 23 – 24.

⁸⁵ CLEC Joint Petitioners GTC DPL § 51.0 p. 101.

⁸⁶ *Id.* At 102; CLEC Coalition GTC DPL § 58.1 p. 122.

concern to have an agreement that keeps pace with technology above a CLEC's need to avoid the huge costs attendant to negotiations and arbitration is unbalanced.⁸⁷

78. SWBT insists that an agreement that exceeds three years will not be current with the pace of technology. SWBT points out that Voice over Internet Protocol, DSL, wireless internet applications and other technological gains clearly demonstrate that a long-term interconnection agreement can become outdated in very quick fashion. SWBT does not believe, as the CLEC Joint Petitioners do, that the "change of law" provisions are effective for the purpose of keeping up with technological changes because those provisions obviously are designed for changes in law, rather than technology, changes. SWBT also cites several state commission decisions that all support three-year terms for interconnection connection.

Determination.

79. While the Arbitrator understands the burden that proceedings such as these place on smaller CLECs, his determinations must be made in accordance with the evidence presented. Here, SWBT makes a compelling argument for the three-year term. The Arbitrator adopts SWBT's position.

General Terms and Conditions--assurance of performance

Joint Petitioners GTC-3

80. The Joint Petitioners propose language to assure that the parties continue to perform their various obligations in accordance with the terms and conditions of the Agreement during any negotiations or dispute resolution pursuant to § 9.1.2 of the

⁸⁷ CLEC Joint Petitioners Direct p. 3 line 24 - p. 5 line 19; Rebuttal p. 3 line 10 - p. 5 line 3.

Agreement.⁸⁸ However, the Joint Petitioners have advised the Arbitrator that the parties were close to settlement of the issue and that it did not need to be discussed further.⁸⁹

Determination.

81. Based upon the Joint Petitioners' representations, the Arbitrator will not address this issue. If settlement is not reached, the Arbitrator would find for SWBT because of what is ostensibly abandonment of the Joint Petitioners' proposal.

General Terms and Conditions--force majeure

Navigator GTC-11

82. Navigator is concerned with SWBT's proposal that payments would still be owed even in force majeure situations. Navigator gave as an example the hurricanes in Florida which prevented payment of bills for weeks. Although admitting that such circumstance is not likely in Kansas, it is concerned that under other force majeure situations, SWBT could penalize a CLEC for non-payment.⁹⁰

83. As discussed briefly above, SWBT proposes to include a provision that both parties' rights and obligations are suspended as long as the force majeure condition exists.⁹¹

Determination.

84. The Arbitrator finds that the record evidence supports Navigator's proposal and the Arbitrator adopts same.

⁸⁸ CLEC Petitioners Schaub Direct p. 4 lines 2 - 18; GTC DPL § 3.1 p. 7 - 8.

⁸⁹ CLEC Petitioners Schaub Rebuttal p. 3 lines 10 - 14.

⁹⁰ Navigator LeDoux Direct p. 14 line 19 - p. 15 line 15.

⁹¹ CLEC Coalition GTC DPL § 17 pp. 86 - 88.

General Terms and Conditions--abandoned facilities

Joint Petitioners GTC-19

85. The Joint Petitioners object to SWBT's proposal that it may recover "abandoned" facilities. The CLEC Coalition believes that the "abandonment" may be temporary in that the next occupant may wish to retain CLEC service. The CLEC Coalition proposes that SWBT cannot recover the facilities unless there is CLEC end user authorization to terminate the service.⁹²

86. SWBT maintains that it is not attempting to "unilaterally decide when a premise is abandoned". SWBT just proposes that when a CLEC's end user abandons her service without disconnection authorization, that SWBT be allowed to recover the facilities to provide service.⁹³

Determination.

87. Despite SWBT's assurance that it does not intend to define the conditions of abandonment, at the end of the day, that is exactly what SWBT would determine. Because SWBT does not clearly define "abandonment" with clarity, the Arbitrator finds "abandonment" vague, subject to a myriad of interpretations and not supported by the record. The Arbitrator adopts the CLECs' positions.

General Terms and Conditions--fines for disparagement

Joint Petitioners GTC-36

88. The Joint Petitioners propose interconnection language which requires both parties to use their best efforts to promptly refer repair and service inquiries to the telephone number provided by the other party. The Joint Petitioners propose that, upon

⁹² Joint Petitioners GTC DPL pp. 65 - 68.

⁹³ SWBT Pellerin Direct p. 12 line 12 – p. 13 line 2.

verified proof of a violation of this section of the agreement, the offending party will be fined \$1,000.⁹⁴

89. SWBT opposes the fine, saying that it does not identify the entity that would receive the \$1,000 (CLEC or the State). SWBT also doubts that the Commission may order one party to pay damages to another. Furthermore, all carriers doing business in Kansas sign a Code of Conduct that assures the Commission that they will not participate in deceptive and unfair marketing practices aimed at other parties' customers.⁹⁵ And, SWBT believes that the proposed fine is an unlawful penalty and cites *IPC Retail Properties v. Oriental Gardens, Inc.*, 32 Kan. App.2d 554, 561 (*IPC Retail*) for support.⁹⁶

Determination.

90. The Arbitrator does not need to determine whether the Commission can or cannot approve a penalty provision in an interconnection agreement because of the *IPC Retail* decision. There, IPC was a landlord of commercial property. Oriental was a tenant. Upon non-payment of rent by Oriental, IPC terminated the lease and demanded accelerated rental payments. The court found that because the accelerated rent provision was not, among other things, based upon a reasonable estimate of damages, the provision was an unlawful penalty rather than a liquidated damages provision. The *IPC Retail* case actually provides nothing new, liquidated damages have long been permitted in contracts but penalties have not. The Arbitrator finds that the record does not establish the

⁹⁴ CLEC Joint Petitioners Schaub Direct p. 11 lines 6 - 23; Rebuttal p.8 line 12 - p. 9 line 12.

⁹⁵ SWBT Pellerin Direct p. 8 line 1 - p. 9 line 17; Rebuttal p. 5 line 1 - p. 2 line 14.

⁹⁶ SWBT Post-Hearing Brief ¶¶ 150 - 155.

proposed \$1,000 fine as a reasonable estimate of damages; rather, the fine possesses all the trappings of a penalty. The Arbitrator, therefore, adopts SWBT's position.

General Terms and Conditions--most favored nation

Joint Petitioners GTC-39

91. The Joint Petitioners propose language that would provide a process for making new prices available to a CLEC, thus preventing SWBT from discriminating against other carriers. Because SWBT currently contacts all CLECs when SWBT advises of changes, the Joint Petitioners give little credence to SWBT's contention that it would be unreasonably burdensome if required.⁹⁷

92. SWBT says that it closed over 100 interconnection agreements and 150 amendments in 2003. SWBT contends that it would be unreasonable and burdensome to be required to provide all the CLECs with notice and explanation of agreements and amendments on this scale. SWBT reminds the CLECs that these are public documents that can be located on the Commission's website. SWBT also reminds CLECs that the FCC has eliminated the pick-and-choose rule in favor of the all-or-nothing rule. Thus, a CLEC could not take advantage of a lower price negotiated by another CLEC unless the CLEC would adopt the entire agreement.⁹⁸

Determination.

93. The FCC's rule contained in 47 C.F.R. 51.809 requires an incumbent LEC to "make available without unreasonable delay to any requesting telecommunications carrier any agreement *in its entirety* . . . upon the same rates, terms and conditions as those

⁹⁷ Joint Petitioners Schmick Direct p. 21 line 8 - p. 9 line 2; Rebuttal p. 16 line 8 - p. 17 line 5.

⁹⁸ SWBT Quate Direct p. 56 line 24 - p. 57 line 11; Rebuttal p. 31 line 22 - 33 line 5.

provided in the agreement." (emphasis added). Thus, it makes very little difference whether one CLEC has negotiated a better price in another interconnection agreement--unless the CLEC is willing to take up the entire agreement. Interconnection agreements, and their amendments, are available on the Commission's website and are available on the CLEC Online Website maintained by SWBT. If not available on the Commission's website, a notification will inform the user to contact the Docket room for a copy. The Arbitrator finds that the CLEC-proposed notice language is not reasonable. Therefore, the Arbitrator adopts SWBT's position.

General Terms and Conditions--referenced documents

CLEC Coalition GTC-44

94. The CLEC Coalition will adhere to SWBT guides referenced in the agreement as long as those guides do not limit or override the rights of the CLEC, and the obligations of SWBT, as specified in the agreement. Further, the CLEC Coalition proposes that if any guide or like document significantly changes the manner in which SWBT provides service to CLEC Coalition members, SWBT cannot adopt these guides or like document without the express written consent of the CLEC.⁹⁹ The CLEC Coalition does not want to approve every change--only when there is a significant change in SWBT's provision of service to a CLEC. The CLEC Coalition believes that it is commercially unreasonable for one party to a contract to significantly change the relationship between the parties by making a change to a practice or like document.¹⁰⁰

⁹⁹ CLEC Coalition GTC DPL § 48 pp. 113 - 115.

¹⁰⁰ CLEC Coalition Joint Direct p. 48 line 26 - p. 50 line 2; Rebuttal p. 33 line 17 - p. 34 line 11.

95. SWBT opposes the proposed language, claiming that SWBT uses a variety of external and internal technical documents in its day-to-day business operations. SWBT contends that as technology evolves over time, these documents are modified. SWBT claims that the CLEC Coalition's proposed language would require SWBT to negotiate any changes to its practices and other documents with numerous CLECs. SWBT also contends that "significant" is relative--what SWBT may deem to be significant may not be so to a CLEC. SWBT is concerned that it would not be able to implement important improvements to its processes in a timely manner because it would be required to wait on the approval of every CLEC that would be affected.¹⁰¹

96. Although Birch/Ionex (Birch) was not identified as involved with this issue, its comments regarding UNEs are germane here. Birch indicated that it sought language in several places of its interconnection agreement that would prevent SWBT from making unilateral changes in its policies, processes, methods or procedures that cause operational disruption or modification of the manner in which SWBT provides services to Birch without providing Birch advanced notice. Further, Birch was of the opinion that its consent should be required in such instances.¹⁰²

Determination.

97. SWBT is wrong in several of its statements on this issue. First, this arbitration is not with all of the CLECs. This particular issue has been raised by the CLEC Coalition, comprised of four CLECs--major players in the marketplace to be sure, but not the entire CLEC community. Second, the CLEC Coalition does not propose that "any change", as portrayed by SWBT, requires CLEC written consent; rather, it is a

¹⁰¹ SWBT Pellerin Direct p. 13 line 3 - p.14 line 8; Rebuttal p. 7 line 17 - p. 10 line 2.

¹⁰² Birch Ivanuska Direct p. 56 line 3 - p. 64 line 25.

change that would significantly alter SWBT's provision of services to CLECs that concerns the CLEC Coaliton. Third, SWBT is not so naïve as not to be able to fathom what changes in provision of services are significant to CLEC Coalition members. Clearly, SWBT is in tune with the Kansas telecommunications marketplace: "We generally like to provide informational notification of things that we know are going to impact the larger CLEC community. . ."¹⁰³ The Arbitrator agrees with the CLEC Coalition that it is not commercially reasonable to allow one party to a contract to significantly change the relationship without the consent of the other party. The Arbitrator finds that the CLECs proposal is reasonable, supported by the evidence and is representative of a commercially reasonable manner to conduct business.

General Terms and Conditions--insurance

Navigator GTC-5

98. Navigator complains about the SWBT-imposed insurance requirements. Navigator does not object to reasonable insurance requirements, but does object to insurance requirements that "bear no rational relations to actual risk". Navigator is concerned with insurance requirements that will "probably" result in premiums well into the six figures.¹⁰⁴

99. SWBT claims it has a vested interest in protecting its infrastructure, network facilities, central offices and its employees. Furthermore, SWBT has different insurance requirements for a CLEC depending on the CLEC's business plan.¹⁰⁵

¹⁰³ SWBT Chapman Tr. Vol. 1 p. 218 lines 17 - 19.

¹⁰⁴ Navigator LeDoux Direct p. 10 line 10 - p. 11 line 12.

¹⁰⁵ SWBT Quate Rebuttal p. 38 line 2 - p. 41 line 15.

Determination.

100. The Arbitrator finds for SWBT with regard to insurance issues. SWBT is entitled to require certain levels of insurance to protect its investments. As it is, SWBT requires different levels of insurance for CLECs. Navigator did not offer any language to counter SWBT's position on the matter. The record evidence favors SWBT in this regard.

General Terms and Conditions--"lawful" UNEs

CLEC Coalition GTC-60; Joint Petitioners GTC-40; Navigator GTC-1

101. The CLEC Coalition believes that this issue should be determined in Phase 2 of these proceedings.¹⁰⁶ The Joint Petitioners deferred discussion of "lawful" UNEs to Phase 2.¹⁰⁷ "Lawful" UNEs was not identified as an issue for AT&T, ostensibly because it expected that this issue would be taken up in Phase 2. AT&T was concerned about not filing testimony on this issue based upon its understanding.¹⁰⁸ Navigator, on the other hand, discussed the issue at some length in its prepared testimony.¹⁰⁹ SWBT discussed the issue in its post-hearing brief.

Determination.

102. Many of the parties anticipated that the "lawful" UNEs issue would be deferred until Phase 2 of these proceedings. AT&T has raised some due process rights

¹⁰⁶ Counsel for CLEC Coalition Tr. Vol 1 p. 95 lines 23 - 25.

¹⁰⁷ Joint Petitioners Schmick Direct p. 22 lines 3 - 10.

¹⁰⁸ AT&T Counsel Tr. Vol. 1 p. 95 lines 4 - 7. AT&T's DPL page 1 contains a footnote stating. "SBC has proposed the use of the term "Lawful UNE" in this appendix and in other parts of the agreement. The parties have agreed to raise this issue in the UNE DPL rather than in every appendix. Accordingly, this issue is set forth in UNE Issue 1. The parties have agreed to conform the entire agreement as appropriate based on the Commission's order relative to UNE Issue 1."

¹⁰⁹ Navigator LeDoux Direct p. 2 line 15 - p. 5 line 6.

based upon its understanding that this issue had been deferred to Phase 2. The Arbitrator finds that the issue of the meaning and significance of "lawful" UNEs will be deferred to Phase 2.

General Terms and Conditions--tariff rates

CLEC Coalition GTC-34

103. SWBT proposes that, to the extent a tariff is referenced in the interconnection agreement, any subsequent changes to the rates, terms or conditions to that tariff shall be automatically incorporated into the agreement.¹¹⁰ SWBT believes that a modified rate is fundamentally different from other modified obligations. For instance, regulatory decisions that would effect UNEs would require a good number of changes in the interconnection agreements. In comparison, a rate change for a particular service or product is simple to inject into the agreement without the burdensome necessity of amending the agreement.¹¹¹

104. The CLEC Coalition admits that SWBT should not be forced to maintain its tariffs in a static nature until expiration of the interconnection agreement or that SWBT must negotiate tariff changes with the CLECs. What bothers the CLEC Coalition is that SWBT allegedly does not plan to provide notice of the change.¹¹² The CLEC Coalition is concerned that SWBT will take advantage of its proposed provision and unilaterally make significant changes to the terms of the agreement without providing the CLECs an opportunity to challenge those changes.¹¹³

¹¹⁰ CLEC Coalition GTC DPL § 37, p.101.

¹¹¹ SWBT Quate Direct p. 5 line 19 - p. 6 line 8.

¹¹² See, ¶¶ 68 - 70 above for discussion of SWBT's obligations to notify CLECs of proposed tariff changes.

¹¹³ CLEC Coalition Joint Direct p. 46 lines 15 - 27.

Determination.

105. The Arbitrator finds SWBT's proposal is both reasonable and efficient. Consequently, the Arbitrator finds for SWBT and adopts its proposed language.

General Terms and Conditions—terms upon expiration

CLEC Coalition GTC-9(a)

106. The CLEC Coalition and SWBT proposed language to govern the parties' rights and obligations after expiration of one interconnection agreement prior to execution of a successor agreement.¹¹⁴ The CLEC Coalition contends that its proposed language reflects the general practice of the parties. Furthermore, the CLEC Coalition has provided for contingencies such as what has occurred with the expiration of the K2A.¹¹⁵ SWBT believes that its proposed language would minimize uncertainties and provide for continued performance by the parties in instances in which SWBT would otherwise be obligated to terminate the interconnection agreement.¹¹⁶

Determination.

107. The record could support either proposal. However, the Arbitrator believes that SWBT's proposal does provide greater clarity of the process to be followed and provides for unusual circumstances. The Arbitrator, therefore, finds for SWBT and adopts SWBT's proposed language.

¹¹⁴ CLEC Coalition GTC DPL § 4.3 pp. 25 - 26 (Coalition); §§ 4.5 - 4.7 pp. 26 - 27 (SWBT).

¹¹⁵ *Id.*; CLEC Coalition Joint Direct p.30 lines 11 - 21; Rebuttal p. 16 line 17 - p. 17 line 4.

¹¹⁶ SWBT Quate Direct p. 51 line 12 - p. 53 line 11.

General Terms and Conditions--material breach

CLEC Coalition GTC-9(b); Navigator GTC-2

108. The CLEC Coalition proposes language that describes the sort of conditions that would be deemed material breach of the agreement. The CLEC Coalition proposed ninety days within which to cure the breach while SWBT proposed 45 days.¹¹⁷ The CLEC Coalition is of the opinion that termination is a draconian measure that should be used only as a last resort for serious failures that are not likely to be cured.¹¹⁸

109. Navigator is concerned that "material" is not defined and that SWBT could thereby blow a minor infraction up to a material breach. Navigator is also bothered by the fact that there is no third party to determine if the offending party has cured the material breach, in which case SWBT could unilaterally determine that the cure was insufficient and terminate the CLEC.¹¹⁹

110. SWBT objects to the CLEC Coalition limitation of material breach to instances of disruption of a party's network and/or material interference with a party's service to its customers because there are other material breaches for which there would be no recourse by SWBT. SWBT believes it has struck the correct balance by preserving its right to bring a CLEC to task for a material breach, yet provide an alternative by which a CLEC may continue to perform in other areas while being deprived only of those services and products related to the material breach.¹²⁰

¹¹⁷ CLEC Coalition GTC DPL § 4.8 p. 27 (Coalition), p. 28 (SWBT).

¹¹⁸ CLEC Coalition Joint Direct p. 30 line 23 - p. 31 line 3; Rebuttal p.17 lines 6 -30.

¹¹⁹ Navigator LeDouz Direct p. 5 line 7 - p. 6 line 12.

¹²⁰ SWBT Quate Direct p. 53 line 18 - p. 56 line 2.

Determination.

111. The Arbitrator believes that Navigator's concerns may be a bit inflated. The Arbitrator believes that SWBT values CLECs in some regards:

The market has changed since the K2A was originally designed. We have a lot more competition off our network where before most of the Competition was still using our network, whereas now we face competition from wireless, from cable. So we have a lot more incentive to work with the CLECs as our customers to keep them on our network because if we lose a customer to cable or wireless, we are not getting anything.¹²¹

The Arbitrator agrees with SWBT that there could be other serious infractions that could rise to the level of material breach such as dangerous collocation practices or frequently endangering the other party's employees with sloppy cable placement. Further, the Arbitrator agrees with SWBT that a material breach should not be able to run for ninety days as proposed by the CLEC Coalition. In sum, the Arbitrator finds for SWBT on all counts of this "material breach" issue.

General Terms and Conditions--change management

CLEC Coalition GTC-38

112. The CLEC Coalition proposes language that requires SWBT to provide timely advance notice of network or system changes. To the extent resources permit, the CLEC Coalition wants the parties to participate in Industry User and Change Management Process (CMP) forums to implement the announced changes to provide minimum disruption to established interfaces. The CLEC Coalition recognizes that the

¹²¹ SWBT Chapman Tr. Vol. 1 p. 99 lines 11 - 20.

CMP documents are on SWBT's website, but wants SWBT's commitment to continue the CMP in the agreement.¹²²

113. SWBT objects to the CLEC Coalition's proposal because the CMP is allegedly unique to Operations Service Support (OSS) and the issue has already been addressed in agreed-upon language in the OSS Attachment 27 at Section 3.10. The CMP is intended to establish a structural means by which CLECs may propose changes to the OSS interfaces.¹²³

Determination.

114. The CLEC Coalition wants SWBT to commit to continue the CMP in the agreement. Apparently this is accomplished in the OSS Attachment 27. The Arbitrator, therefore, finds for SWBT on this matter.

General Terms and Conditions--separate affiliate obligations

CLEC Coalition GTC-53

115. The CLEC Coalition proposes language that requires SWBT to comply with all FCC rules and orders relating to the structural and non-structural requirements for Section 272 affiliates. The CLEC Coalition again notes that SWBT had made certain commitments to the Commission in relation to SWBT's 271 application. The CLEC Coalition believes those representations and commitments should be included in the K2A successor agreement.¹²⁴

¹²² CLEC Coalition GTC DPL §§ 41.3.1 and 41.3.2; CLEC Coalition Joint Direct p. 48 lines 2 - 23.

¹²³ CLEC Coalition GTC DPL pp. 103 - 108 (SBC Kansas Preliminary Position).

¹²⁴ CLEC Coalition GTC DPL §§ 67.0 - 67.5 pp. 123 - 125.

116. SWBT argues that the 271 commitments it made in the K2A were the result of negotiations. As discussed in SWBT's testimony related to the 251/271 issue above, section 252 of the Act does not require inclusion of 271 matters in an interconnection agreement.¹²⁵

Determination.

117. The Arbitrator previously found in ¶ 10 above that, due to the independent nature of § 251 *vis-à-vis* § 271 obligations, SWBT was not required to meld § 271 into a § 251 arbitration. The same is true with this affiliate issue. Consequently, the Arbitrator finds for SWBT.

General Terms and Conditions--novation

CLEC Coalition GTC-55

118. SWBT proposes novation language stating the agreement, consisting of appendices, attachments, exhibits, schedules and addenda is the entire agreement and supersedes any prior agreement. SWBT then notes that, although the CLEC Coalition failed to produce testimony in support of its position, the CLEC Coalition argues that the proposed language is superfluous. SWBT then cites Quate testimony which notes, "It is perfectly reasonable to expect the new agreement, once approved by the commission, to supercedes the prior agreement."¹²⁶

119. The CLEC Coalition does believe the proposed language is superfluous because the agreement already contains an agreed-upon provision in § 39.1, stating that the agreement supersedes any prior agreement.

¹²⁵ SWBT Post-Hearing Brief ¶ 211.

¹²⁶ *Id.* ¶ 214.

Determination.

120. Section 39.1 of the agreement plainly states:

This Agreement constitutes the entire agreement between the Parties concerning the subject matter hereof and supersedes any prior agreements, representations, statements, negotiations, understandings, proposals or undertakings, oral or written, with respect to the subject matter expressly set forth herein.

The CLEC Coalition is correct--SWBT's proposed novation language is superfluous. The Arbitrator adopts the position of the CLEC Coalition in this matter.

General Terms and Conditions--changes in UNE offerings

Birch GTC-1.3, 1.7

121. The Arbitrator notes that the foregoing issues have already been determined in ¶ 97 above. In fact, the Arbitrator mentioned in ¶ 96 that Birch's comments were germane to the issue. The Arbitrator included the Birch comments in his deliberations leading to his determination. The Arbitrator advises Birch to conduct itself in accordance with the determination articulated in ¶ 97 above.

General Terms and Conditions--billing dispute process

Birch GTC-8.4.1.1, 8.5.1.1

122. The issues raised by Birch were discussed in ¶¶ 37 and 38 and determined by the Arbitrator in ¶ 39. The Arbitrator directs Birch to conform its conduct consistent with the Arbitrator's determination in that regard.

General Terms and Conditions--creditworthiness

Birch GTC- 8.1.1,

123. The issues raised by Birch here were discussed in ¶¶ 44 - 51, culminating in

Arbitrator's determination in ¶¶ 52 and 53. The Arbitrator's determination in those paragraphs govern this issue.

General Terms and Conditions--DUF

Navigator GTC-9

124. Navigator did not propose to change the language suggested by SWBT in this matter other than to remove "lawful" in reference to UNEs. The Arbitrator determined in ¶ 102 above to defer the significance and meaning of "lawful" UNES to Phase 2 of these proceedings.

General Terms and Conditions--accessible letters

Navigator GTC-10

125. Navigator proposes that SWBT's Accessible Letters be used only for informational purposes, not to change, contradict or affect the agreement.¹²⁷

126. SWBT describes its Accessible Letters as providing CLECs with information about new retail telecommunications services offered for resale, retail promotion, OSS changes and updates and other industry information that may or may not impact CLEC systems and processes. The Accessible Letter is a collaboratively defined and agreed to process that is designed to provide CLECs with a 30-day advanced notice regarding such information and changes. Furthermore, SWBT believes that if the Commission would adopt Navigator's proposal, SWBT would be required to amend every interconnection agreement for each process change, no matter how minor. SWBT

¹²⁷ Navigator LeDoux Direct p. 13 line 11 - p. 14 line 18

contends that the paperwork would overwhelm SWBT, the CLECs and the Commission.¹²⁸

Determination.

127. Although the Arbitrator is troubled by SWBT's use of Accessible Letters to change interconnection agreements, as SWBT admits it does, at the end of the day the Arbitrator must find that Accessible Letters, despite their faults, are useful tools for both SWBT and the CLEC community. SWBT did state during the proceedings that the Accessible Letter process is not a means used for amending interconnection agreements.¹²⁹ Furthermore, the potential impact of Accessible Letters is tempered by the Arbitrator's determination in ¶ 97. Therefore, the Arbitrator finds for SWBT in this matter.

General Terms and Conditions--same service to customer

Navigator GTC-12

128. Navigator is concerned that the language in § 50.4 enables SWBT to offer the same services to a customer that Navigator provides and that SWBT would offer those services to the customer at the same rates that SWBT charges Navigator.¹³⁰

129. SWBT agrees that, upon customer request, it would offer the same services as Navigator. However, SWBT could only do so at the rates found in its retail tariff. Thus, the additional language proposed by Navigator is unnecessary.¹³¹

¹²⁸ SWBT Post-Hearing Brief ¶¶ 233 -36.

¹²⁹ See, footnote 109, although that testimony seems a bit at odds with SWBT's Post-Hearing Brief ¶ 235.

¹³⁰ Navigator LeDoux Direct p. 15 line 16 - p. 16 line 12.

¹³¹ SWBT Quate Rebuttal p. 44 lines 10 - 17.

Determination.

130. The Arbitrator finds for SWBT. SWBT must price services to its non-CLEC customers out of its retail tariff.

Resale--consolidated pricing schedule, "End User"

CLEC Coalition R-2, R-6¹³²

131. SWBT proposes to include resale prices in a consolidated price schedule of all rates in the interconnection agreement. SWBT maintains that a consolidated price schedule lends itself to ease of use and clarity. SWBT alleges that the consolidated price schedule was created at the behest of several CLECs, including members of the CLEC Coalition.¹³³

132. The CLEC Coalition now proposes a separate pricing list for resale pricing items because the resale pricing list is quite extensive. The CLEC Coalition believes that a separate resale pricing list will benefit CLECs that provide their service principally through resale and CLECs that provide their service principally through UNES. The CLEC Coalition asserts that maintaining the existing, manageable practice of separate resale pricing is more desirable than moving to an unwieldy consolidated schedule.¹³⁴

Determination.

133. Despite the apparent good intentions of SWBT, the record favors the CLEC Coalition's proposal that the separate resale pricing list be retained. Thus, the Arbitrator finds for the CLEC Coalition in this matter.

¹³² CLEC Coalition R-6 deals with the SWBT-proposed use of "End User". That issue was resolved in favor of the CLECs and need not be further discussed here.

¹³³ SWBT Silver Direct p. 24 line 13 - p. 25 line 4; SWBT Post-Hearing Brief ¶¶ 243 and 244.

¹³⁴ CLEC Coalition Resale DPL § 1.3 p. 1.

Resale--off-premises extensions

Joint Petitioners R-3

134. Joint Petitioners propose using off-premises extensions in conjunction with private line services and PLEXAR services to provide service to CLEC resale service customers located outside of SWBT's local exchange area.¹³⁵

135. SWBT agrees with the Joint Petitioners but only where SWBT has established meet point facilities and related billing arrangements with the other ILEC in whose territory the end user is located.¹³⁶

Determination.

136. Because the Joint Petitioners neither set out a position statement in their DPL nor presented testimony in support of their proposal, the record evidence favors SWBT. The Arbitrator adopts SWBT's proposed language.

Resale--call-blocking

Joint Petitioners R-11

137. The Joint Petitioners propose language that absolves them of charges associated with collect, third-number-billed and 900 calls when such calls bypass SWBT's blocking mechanisms even though the CLEC Coalition member has properly ordered and paid for the appropriate blocking mechanism for these calls.¹³⁷

138. SWBT proposes language that obligates the CLECs to bear the cost of charges incurred for their end user call when no blocking is available.¹³⁸

¹³⁵ Joint Petitioners Resale DPL § 1.9 p. 2. There is no position statement for the proposed language.

¹³⁶ *Id.*

¹³⁷ Joint Petitioners Resale DPL § 11.1.1 pp. 27 - 28. There is no position statement accompanying the proposed language.

Determination.

139. With no position statement in the DPL and no supporting testimony offered by the Joint Petitioners on this subject matter, the record favors SWBT's proposed language and the Arbitrator adopts same.

Resale--unbillable IXC carried calls

Joint Petitioners R-12

140. The Joint Petitioners propose language that interexchange carrier traffic received by SWBT for billing to resold end user accounts will not be passed onto the serving CLEC. The Joint Petitioners insist that they should not be responsible for these calls because they had nothing to do with them.¹³⁹

141. SWBT objects to the proposal. SWBT believes that CLECs are solely responsible for their customers' calls in this competitive market. SWBT further believes that, if the Joint Petitioners do not bill their customers for these calls, their customers will enjoy a windfall to the detriment of other CLEC competitors.

Determination.

142. The Arbitrator agrees with SWBT. The customer buying resold services from a CLEC is that CLEC's customer and the CLEC is responsible for his billings. The Arbitrator finds for SWBT.

Resale--restoral nomenclature

Joint Petitioners R-14

143. When a CLEC providing resold services restores service to one of its customers that had previously been disconnected, SWBT will charge the CLEC for the

¹³⁸ SWBT Pellerin Direct p. 18 line 8 - p. 20 line 11.

¹³⁹ Joint Petitioners Schmick Direct p. 23 line 21 - p. 24 line 7.

restoral of service. There is no argument about that fact. However, the Joint Petitioners want to refer to the charges as "restoral charges" while SWBT proposes to call the charges "a Service Connection Charge for Restoral of Service."¹⁴⁰

Determination.

144. The Arbitrator finds SWBT's description to be more precise than that of the Joint Petitioners. The Arbitrator, therefore, finds for SWBT and adopts its proposed language.

Resale—restoral charges

Joint Petitioners R-15

145. It is the contention of the Joint Petitioners that, when one of its members places an electronic order to restore the resold service of a previously disconnected customer, it is placing an order for a UNE and should be charged the TELRIC rate of \$2.35. The Joint Petitioners arrive at this proposition because they view the restoral functions as an OSS function. The Joint Petitioners allege that SWBT has admitted that the restoral function is not governed by SWBT's retail tariff.¹⁴¹

146. SWBT admits that the FCC's TRO obligates it to permit commingling of UNE/UNE combinations with resold services. However, SWBT contends that ordering of a resold service on a resold line does not constitute commingling as the FCC intended. The restoral service is a non-telecommunications service offered to resale LECs on a voluntary basis. SWBT further explains that the Commission did not require a discount

¹⁴⁰ Joint Petitioners Resale DPL § 21.1 p. 10.

¹⁴¹ Joint Petitioners Shaub Direct p. 12 line 13 - p. 15 line 17; Rebuttal p. 11 line 1 - p. 12 line 16.

on the service because it was a voluntary retail non-telecommunications service provided at the retail tariff rate of \$25, the same as SWBT charges its retail customers.¹⁴²

Determination.

147. The Joint Petitioners raise an interesting argument. However, there is no denial that the Commission has approved the Service Connection Charge for Restoral of Service as a tariffed item and the tariffed rate of \$25. The Arbitrator, therefore, finds for SWBT in this matter.

Resale--simple/complex order

CLEC Coalition R-5

148. The non-cost portion of both CLEC Coalition R-5 and Joint Petitioners R-17 deals with whether an order is simple or complex. It is the CLEC Coalition's belief that the difference between a simple order and a complex order should be determined by the products or services ordered, not whether the order can flow-through electronically without manual intervention. Basing the definition of simple/complex order upon its electronic flow-through capability places the CLEC at the total discretion of SWBT because it is SWBT that maintains significant control of the process.¹⁴³ The CLEC Coalition apparently also has another method to determine if an order is simple or complex: If either SWBT or a member of the CLEC Coalition can handle an order on an electronic flow-through basis, it's a simple order. All others are complex.¹⁴⁴

149. SWBT considers a simple order one that does not require manual intervention. Although a CLEC may electronically submit an order, the order may

¹⁴² SWBT Smith Direct p. 12 line 3 - p. 15 line 20.

¹⁴³ CLEC Coalition Ivanuska Rebuttal p. 7 line 10 - p. 8 line 7.

¹⁴⁴ CLEC Coalition Resale DPL § 3.1.4 p. 23.

contain errors and a SWBT representative must pull the order to determine the source of the error. In other instances, CLECs submit orders for electronic processing that are not capable of being provisioned through flow-through processing. For example, direct-inward-dial trunk group orders involve trunk group assignment, route indices, switch assignment, telephone numbers assigned to the route indices and routing these numbers to the appropriate trunk group. The order can be submitted by the CLECs electronically, but SWBT must work the order on a manual basis.¹⁴⁵

Determination.

150. The Arbitrator is uncertain which test the CLEC Coalition is proposing. If the test is products and services, the CLEC Coalition did not identify what sort of products or services would qualify for simple orders and which ones for complex orders. If the test is that either a Coalition member or SWBT can electronically handle an order, this would serve as an overstatement because not all electronically conveyed orders contain errorless entries. The Arbitrator understands the uneasiness of the CLECs with the prospect that it must trust SWBT to identify which orders do fall out and require manual intervention, but as a CLEC Coalition witness said during the proceedings:

We exhibit a high degree of trust of SBC. They house our CPNI on UNE-P customers, too. We trust that their retail side is not accessing our customer CPNI inappropriately. There's days when I am worried about them doing that. There's days when I think they have; but at the end of the day, we all have to live in some sort of a trust me mode.¹⁴⁶

The Arbitrator finds for SWBT in this matter. Its distinction between simple and complex orders is straight-forward, as opposed to unidentified products and services, and

¹⁴⁵ SWBT Christensen Tr. Vol. 1 p. 261 lines 2 - 18.

¹⁴⁶ CLEC Coalition Ivanuska Tr. Vol. 2 p. 371 lines 4 -11.

it is the party that sees the order flow-through or fall-out, as opposed to a party who can send an order electronically.

Operations Service Support--CPNI

AT&T OSS-1; CLEC Coalition OSS-4; Joint Petitioners OSS-3

151. SWBT advises that there is no dispute about the disclosure of Customer Proprietary Network Information (CPNI); rather, the dispute concerns the CLECs' ability to obtain electronic access to CPNI via SWBT's OSS prior to a customer's authorization for the CLEC to become the customer's local service provider.¹⁴⁷ SWBT proposes the following language to prevent such CLEC access:

Within SBC KANSAS regions, CLEC's access to pre-order functions described in 4.2.2 will only be utilized to view customer Proprietary Network Information (CPNI) of another carrier's End User where CLEC has obtained an authorization for release of CPNI from the End User and has obtained an authorization to become the End User's Local Service Provider.

SWBT justifies this restriction to a customer's CPNI by noting that it is obligated to provide access to OSS only for pre-order, order, provisioning, repair/maintenance and billing. According to SWBT, a CLEC is not in a pre-order mode until it needs access to customer service records to prepare and submit an order. SWBT accuses the CLEC Coalition and AT&T of blurring the distinction between properly accessing OSS to order local service for a specific customer and accessing OSS for marketing services to potential customers. SWBT believes that restricting OSS in this fashion will protect customers. SWBT also points to the FCC's 2002 CPNI order in which the FCC, in responding to MCI WorldCom's request for access to CPNI prior to the first meeting with

¹⁴⁷ SWBT Post-Hearing Brief ¶ 606.

a potential customer, stated, "MCI . . . does not establish how the need for this information during an initial cold call to a potential customer overcomes that customer's privacy interests--especially since there is no existing business relations, making MCI . . . or another similarly situated carrier a third party to the consumer." Finally, SWBT insists that its proposed restriction on CPNI is not anti-competitive. SWBT will provide a hard copy of a customer's service record with customer authorization, but not access to OSS unless the end user has also authorized AT&T to convert its service from SWBT to AT&T. SWBT insists that its proposal will protect the customer and prevent the copying of SWBT's database by a CLEC as occurred in Michigan.¹⁴⁸

152. AT&T firmly believes that negotiations with an end user who is considering whether or not to change local service providers are clearly pre-ordering activities. According to AT&T, a seasoned SWBT witness agreed with AT&T's take on this issue during the Texas 271 proceeding:

Pre-ordering involves the exchange of information between SWBT and a CLEC about an end user during the CLEC's "negotiation phase" with its end user customer. The term "negotiation" in this context refers to the discussion between the end user and CLEC regarding local service. Pre-ordering activities enable the CLEC to submit a complete and accurate service request to SWBT.

AT&T relates that the customer most often does not know all the services that he is receiving from his local service provider. Thus, AT&T needs the CPNI to fully understand what services the customer is receiving and if AT&T can provide these same services. AT&T claims that SWBT's proposed language is anti-competitive.¹⁴⁹

¹⁴⁸ SWBT Christensen Direct p. 3 line 22 - p. 8 line 18; Rebuttal p. 9 line 7 - p. 14 line 9.

¹⁴⁹ AT&T Willard Direct p. 8 line 13 - p. 13 line 2.

153. The CLEC Coalition explains that its members currently are provided access to OSS with customer authorization and believes SWBT's proposal would force the CLEC to take a giant leap backwards to the world of manual processing. The hard copy that SWBT is willing to produce is inefficient and expensive.¹⁵⁰

Determination.

154. The Arbitrator rejects SWBT's proposal. What the FCC was describing in its CPNI Order was a carrier's "initial cold call" which is much different than an end user considering switching local service providers and giving the carrier authorization to access his CPNI. Once the customer has done so, the carrier is no longer a third party but is acting on behalf of the end user for the specific purpose of reviewing the end user's CPNI. It would appear that SWBT proposes to foist a clumsy and inefficient process on the CLECs that will result in a slower response to the potential customer by a CLEC. Impairing the efforts of the CLECs to convert customers to their service in this manner is unacceptable.

Operations Service Support--indemnification

CLEC Coalition OSS-3

155. SWBT proposes language that charges members of the CLEC Coalition with responsibility for, and indemnifying SWBT against, claims by a CLEC customer or other third parties relating to any unauthorized entry into SWBT's OSS system by CLEC employees, agents or third parties accessing the system with CLEC facilities or information. SWBT does not believe that the indemnifications in the GT&C section are

¹⁵⁰ CLEC Coalition Ivanuska Rebuttal p. 5 line 8 - p. 7 line 9; Tr. Vol. 2 p. 366 line 8 - 368 line 19.

specific enough to address the potential harm that can occur from misuse of SWBT's OSS system.¹⁵¹

156. The CLEC Coalition believes that this proposed indemnification should be addressed in the GT&C section.¹⁵²

Determination.

157. The CLEC Coalition did not provide testimony on, or brief, this issue. The record evidence favors SWBT's position and the Arbitrator adopts same.

Operations Service Support--Performance Measures exclusions

CLEC Coalition OSS-6

158. SWBT proposes to maintain language within the interconnection agreement that clearly identifies Performance Measures exclusions with regard to missed due dates and average delay days that are caused by a CLEC error.¹⁵³

159. The CLEC Coalition believes the service order should be adjusted and still count in the calculation of performance measurements with an adjustment for the revised time period.¹⁵⁴

Determination.

160. The CLEC Coalition did not provide testimony on, or brief, this issue. The record evidence favors SWBT's position and the Arbitrator adopts same.

Operation Service Support--ISCC

¹⁵¹ SWBT Christensen Supplemental p. 3 line 12 - p. 5 line 10.

¹⁵² CLEC Coalition OSS DPL § 3.4.1 p. 3.

¹⁵³ SWBT Christensen Direct p. 9 line 17 - p. 10 line 14.

¹⁵⁴ CLEC Coalition OSS DPL § 5.3.3.3 p. 7.

Joint Petitioners OSS-4

161. The Joint Petitioners propose that, when the information systems call center (ISCC) is on pager, that an ISCC representative must return a CLEC's page within 15 minutes of the call.¹⁵⁵

162. SWBT believes that one CLEC should not be able to change SWBT's staffing requirements.¹⁵⁶

Determination

163. Because the Joint Petitioners did not include a position statement with its proposed language, did not provide testimony on this issue or brief the matter, the record evidence favors SWBT's proposed language and the Arbitrator adopts same.

Operation Service Support--enhancement

Joint Petitioners OSS-5

Determination.

164. Again the Joint Petitioners did not include a position statement with its proposed language, did not provide testimony on this issue or brief the matter, the record evidence favors SWBT's proposed language and the Arbitrator adopts same.

Operation Service Support--EEL reference

¹⁵⁵ Joint Petitioners OSS DPL § 3.8 p. 5.

¹⁵⁶ SWBT Christensen Tr. Vol. 2 p. 360 line 3 - p. 361 line 20.

Joint Petitioners OSS-6¹⁵⁷

165. The Joint Petitioners propose to maintain the current language related to Extended Enhanced Loops/Links (EELs). The Joint Petitioners suggest that even if the FCC finds no impairment SWBT would still be obligated to provide EELs under Section 271 of the Act and state law at cost-based rates. The Joint Petitioners suggest in their brief that if future changes in the UNE list require removal, that could be easily accomplished at that time.¹⁵⁸

166. SWBT objects to inclusion of EELs because *USTA II* vacated FCC rules 51.319(e) pertaining to dedicated transport and 51.319(a)(4), (5) and (7) pertaining to DS1, DS3 and dark fiber loops. Without these UNEs, there can be no EELs.¹⁵⁹

Determination.

167. The Arbitrator finds for SWBT. Inclusion of language of how to order a UNE that has been eliminated by a federal court makes no sense. The current law is that the UNEs by which EELs are created have been judged unlawful. If there is a change in current law, that can be easily accomplished by an amendment.

Operation Service Support--business-to-business, high bandwidth, CHC methods

¹⁵⁷ AT&T proposed in what manner Extended Enhanced Loops/Links should be ordered in its OSS DPL § 5.7. Because AT&T did not provide testimony for, or brief, the matter, the Arbitrator finds for SWBT.

¹⁵⁸ Joint Petitioners Post-Hearing Brief ¶ 77.

¹⁵⁹ SWBT Silver Direct p. 12 lines 3 - 10.

Joint Petitioners OSS-8,-9 and-10

Determination.

168. The Joint Petitioners did not include a position statement for any of these issues, did not provide testimony on the issues or brief the matters. The Arbitrator finds for SWBT and adopts its language.

Operation Service Support--lawful

Navigator OSS-1

Determination.

169. Navigator objects to the word "lawful" placed before every reference to UNEs. This matter is to be addressed in Phase II and will not be determined here.

Operation Service Support--office hours

Navigator OSS-2

170. Navigator suggests that SWBT be directed to maintain the same hours for its wholesale LOC and LSC offices as SWBT does for its retail offices. Navigator claims that the disparity in office hours poses a significant competitive advantage for SWBT.¹⁶⁰

171. As with the Joint Petitioners' issue 4 above, SWBT does not believe that one CLEC should be able to determine SWBT's staffing requirements.¹⁶¹

Determination.

172. Navigator never explains why the disparity in office hours between the wholesale and retail offices represents such a significant competitive advantage for

¹⁶⁰ Navigator LeDoux Direct p. 17 line 21 - p. 18 line 4.

¹⁶¹ SWBT Christenson Tr. Vol. 2 p. 360 line 3 - p. 361 line 20.

SWBT. Without that information, the record evidence favors SWBT's position which the Arbitrator hereby adopts.

Order and Provisioning--Callnotes coordination

CLEC Coalition OP-5

173. Although the CLEC Coalition proposes to retain the current K2A language relative to Callnotes, it appears that the CLEC Coalition adds language which would obligate SWBT to coordinate with SMSI to avoid interruption of Callnotes service during conversion to CLEC services.¹⁶²

174. SWBT disagrees because Callnotes is provided by SBC messaging which is responsible for any required coordination.¹⁶³

Determination.

175. The CLEC Coalition did not provide testimony for, or brief, this matter. The Arbitrator, therefore, finds that the record evidence favors SWBT and the Arbitrator adopts SWBT's position.

Order and Provisioning--customer migration

CLEC Coalition OP-7

176. The CLEC Coalition proposes language that its members and SWBT would abide by any Commission customer migration requirements for the handling of CLEC-to-CLEC and CLEC-to-ILEC migration.¹⁶⁴

¹⁶² CLEC Coalition Resale & Related Attachments/Appendices DPL § 1.17 p. 47.

¹⁶³ SWBT Pellerin Direct p. 16 lines 3 - 11.

¹⁶⁴ CLEC Coalition Resale & Related Attachments/Appendices DPL § 2.2 p. 49.

177. SWBT maintains that it is not aware of any Commission guidelines regarding customer migrations and suggests that the Commission adopt its language.¹⁶⁵

Determination.

178. The CLEC Coalition did not provide testimony for, or brief, this issue. Therefore, the Arbitrator finds that the record evidence favors SWBT's proposed language and the Arbitrator adopts same.

Order and Provisioning--resale pricing

CLEC Coalition OP-12

179. The CLEC Coalition believes that Resale pricing should be in its own rate schedule; SWBT does not.

Determination.

180. The Arbitrator has previously found for the CLEC Coalition with regard to this same issue in ¶ 133 above.

Order and Provisioning--performance metrics

CLEC Coalition OP-13

181. The CLEC Coalition proposes to maintain the present language found in the K2A with regard to ordering and provisioning performance metrics.¹⁶⁶

182. SWBT disagrees, saying that any performance metrics should be contained in Attachment 17 Performance Measures.¹⁶⁷

¹⁶⁵ SWBT Pellerin Direct p. 16 lines 12 - 17.

¹⁶⁶ CLEC Coalition Resale & Related Attachments/Appendices DPL § 7.1 p. 53.

¹⁶⁷ SWBT Pellerin Direct p. 16 line 18 - p. 17 line 2.

Determination.

183. The CLEC Coalition did not provide testimony for, or brief, this issue. Therefore, the Arbitrator finds that the record evidence supports SWBT's position and the Arbitrator adopts same.

Maintenance--94-08-001

CLEC Coalition MR-1

184. The CLEC Coalition proposes to add language to Maintenance § 3.1 that requires the parties to follow the severity and priority restoration guidelines set forth in SWBT's MMP 94-08-001.¹⁶⁸

185. SWBT says that this document is outdated and is no longer in usc.¹⁶⁹

Determination.

186. Neither the CLEC Coalition nor SWBT provided testimony for this issue. But, SWBT did brief the matter. The CLEC Coalition failed to carry its burden of proof in proposing the new language. The Arbitrator, therefore, must find that the CLEC Coalition's proposed language should be rejected. The Arbitrator adopts SWBT's position notwithstanding the fact the SWBT did not provide information about the document that is in effect, if there is one.

¹⁶⁸ CLEC Coalition Resale & Related Attachments/Appendices DPL§ 3.1 p. 55.

¹⁶⁹ *Id.*; SWBT Post-Hearing Brief ¶¶ 309 - 310.

Connectivity & Billing--976 calls

CLEC Coalition BC-1, CUD-3

187. The CLEC Coalition proposes that the established settlement procedures be used to receive adjustments from SWBT for 976 calls forwarded by SWBT to CLEC members when the CLEC customer refuses to pay for the charges.¹⁷⁰

188. SWBT disagrees with the proposal. SWBT provides CLECs with ability to block their customers from placing 900 and 976 calls. SWBT does not believe that it is reasonable to expect SWBT to pay for these calls when the CLEC customers refuse to pay the associated charges.¹⁷¹

Determination.

189. The CLEC Coalition did not provide testimony for, or brief, this issue. Consequently, the Arbitrator finds that the record evidence supports SWBT's position and the Arbitrator adopts same.

Connectivity & Billing--payment terms

CLEC Coalition BC-2

190. The CLEC Coalition proposes language that provides for payment subject to the terms of the GT&C section of the agreement. The CLEC Coalition believes that there are no special circumstances in the Connectivity & Billing attachment that requires separate payment conditions.¹⁷²

191. SWBT, on the other hand, believes that separate payment requirements for

¹⁷⁰ CLEC Coalition Resale & Related Attachments/Appendices DPL § 3.4 p. 56.

¹⁷¹ SWBT Pellerin Direct p. 20 lines 12 - 23.

¹⁷² CLEC Coalition Resale & Related Attachments/Appendices DPL § 9.1 p. 56.

Connectivity & Billing are necessary to inform the CLECs of when payments are due and how those payments are to be made.¹⁷³

Determination.

192. Neither the CLEC Coalition nor SWBT provided testimony of this issue. The Arbitrator could not follow SWBT's references to its brief. The Arbitrator finds that the record supports the CLEC Coalition's proposed language better than it does SWBT's proposal. The Arbitrator adopts the CLEC language.

Customer Usage Data--limits on data

CLEC Coalition CUD-R-1

193. The CLEC Coalition proposes to retain the existing K2A language with minor changes.¹⁷⁴

194. SWBT opposes the amended language and reports that it provides customer usage date on all calls that are recorded on behalf of each CLEC which serves as an information source.¹⁷⁵

Determination.

195. The CLEC Coalition did not provide testimony for, or brief, this issue. Consequently, the Arbitrator finds that the record evidence supports SWBT's position and the Arbitrator adopts same.

¹⁷³ *Id.*

¹⁷⁴ CLEC Coalition Resale & Related Attachments/Appendices DPL § 3.1 p. 58.

¹⁷⁵ SWBT Pellerin Direct p. 28 lines 2 - 11.

Customer Usage Data--only to CLEC

CLEC Coalition CUD-R-2

196. The CLEC Coalition proposes to retain the existing K2A language for this issue.¹⁷⁶

197. SWBT believes the provision is unnecessary as it uses its best efforts to assure that usage data is properly distributed.¹⁷⁷

Determination.

198. The CLEC Coalition did not provide testimony for, or brief, this issue. Consequently, the Arbitrator finds that the record evidence supports SWBT's position.

Customer Usage Data--single contact point

CLEC Coalition CUD-R-7

199. The CLEC Coalition proposes language that requires SWBT to establish a single point of contact to respond to CLEC call usage, data error and record transmission inquiries.¹⁷⁸

200. SWBT opposes this proposal because it services CLECs differently depending upon the inquiry. The language proposed by SWBT establishes the IS Call Center as the contact point for transmission inquiries while other inquiries are better handled by the CLEC's account manager.¹⁷⁹

¹⁷⁶ CLEC Coalition Resale & Related Attachments/Appendices DPL § 3.2 p. 59.

¹⁷⁷ SWBT Pellerin Direct p. 28 lines 12 - 18.

¹⁷⁸ CLEC Coalition Resale & Related Attachments/Appendices DPL § 5.6 p. 62.

¹⁷⁹ SWBT Pellerin Direct p. 22 line 1 - p. 24 - line 2.

Determination.

201. The CLEC Coalition did not provide testimony for, or brief, this issue. Consequently, the Arbitrator finds that the record evidence supports SWBT's position and its proposed language. The Arbitrator adopts same.

Customer Usage Data--price schedule

CLEC Coalition CUD-R-8, CUD-R-9

202. The CLEC Coalition adopted SWBT's language with regard to this issue, except that it wants the pricing reference to be contained in the Resale Pricing Appendix.¹⁸⁰

203. SWBT believes that a single pricing appendix is more manageable, allowing the CLECs, SWBT and the Commission to access all rates applied to all products and services in the agreement in one attachment.¹⁸¹

Determination.

204. In view of the Arbitrator's determinations in paragraphs 133 and 180 above, the Arbitrator finds for the CLEC Coalition and adopts its proposed language, limited to the CLEC Coalition's proposal for the pricing reference to be to the Resale Pricing Appendix.

Customer Usage Data--specific rules

Navigator CUD-R-1

205. Navigator ties its CUD issue to section 7.1 of Attachment Customer Usage-Resale, which deals with Local Account Maintenance. Navigator clarified its

¹⁸⁰ CLEC Coalition Resale & Related Attachments/Appendices DPL § 6.2 pp. 62 -63.

¹⁸¹ SWBT Smith Direct p. 38 line 23 - p. 39 line 8.

position during the hearings.¹⁸² What Navigator proposes is that SWBT clearly identify the document upon which the parties should rely, e.g., Daily Usage File Users Guide Issue #1.¹⁸³

206. SWBT apparently focused on Navigator's apparent proposed language which referenced the Local Account Maintenance section.¹⁸⁴ However, SWBT understood Navigator's position after Navigator's testimony in the hearing. Ms. Pellerin of SWBT observed that Navigator recognized that the daily usage file practices are not something that SWBT changes in a vacuum; rather, such practices are developed with CLEC input and change as the industry changes. Tying the daily usage data provisions to a particular issue in the interconnection agreement would require amendments each time the industry improves a process.¹⁸⁵

Determination.

207. Although the Arbitrator understands Navigator's wish to reference a particular document, or issue of that document, and to freeze it into the agreement, the Arbitrator must find for SWBT in this regard based upon the record. The industry seems to change in a very quick fashion, e.g. the introduction of VOIP. Requiring the parties to an interconnection agreement to amend certain provisions every time the industry shifts gears is not an efficient manner in which to conduct business, especially in light of the opportunity for CLECs to engage in user forums prior to a change in a document.

¹⁸² Navigator LeDoux p. 18 lines five - 15.

¹⁸³ Navigator LeDoux Tr. Vol. 2 p. 398 line 23 - p. 399 line 24.

¹⁸⁴ SWBT Pellerin Rebuttal p. 10 line 18 - p. 11 line 11.

¹⁸⁵ SWBT Pellerin Tr. Vol. 2 p. 401 lines 8 - 25.

Alternately Billed Services--Clearinghouse

CLEC Coalition ABS-1; Joint Petitioners ABS-1.

208. SWBT explains in its post-hearing brief that alternately billed services (ABS) calls are calls that are made from, and billed to, a telephone number other than the number from which the call was made--collect calls, calls billed to third number and calling card calls. According to SWBT, when an ABS call is made, the recording carrier is not the carrier of record for the end user to whom the call is billable. Thus, it is necessary for the recording carrier and the end user's carrier to exchange billing records, although a CLEC could block ABS calls if it did not wish to participate in the process.

209. SWBT also explained that compensation for the ABS-recording carrier is dependent upon whether the CLEC is a reseller, facilities-based or a UNE-P carrier. A reseller has no separate ABS settlement process because it does not have its own switch. A facilities-based provider uses the Clearinghouse process built upon the identification of switch codes. UNE-P carriers are a bit like resellers--they do not have their own switch and have no means to record call detail on their own. However, SWBT does provide UNE-P CLECs with ABS call detail recordings in the form of rated messages from the daily usage files. The UNE-P CLEC bills its customers and compensates SWBT for the rated messages less a billing and collection fee.¹⁸⁶

210. The CLEC Coalition insists that the Clearinghouse was established to serve the purpose of settling compensation from all ABS calls, whether those calls involved a facilities-based or a UNE-P provider, since its inception in 1988. As such, the CLEC Coalition wants its ABS calls to be processed through the Clearinghouse process

¹⁸⁶ SWBT Smith Direct p. 26 line 1 - p. 27 line 23.

especially since some of its members are both facilities-based and UNE-P carriers and must, therefore, settle ABS calls through two systems.¹⁸⁷ The CLEC Coalition claims that the NPA/NXX codes are no longer pure and insists that SWBT has both the knowledge and the process in place today to identify and appropriately settle ABS calls via the current Clearinghouse process.¹⁸⁸

211. The Joint Petitioners believe that a separate Clearinghouse attachment is unnecessary because all relevant provisions are referenced elsewhere in the agreement.¹⁸⁹

Determination.

212. The Arbitrator finds the CLEC Coalition testimony a bit inconsistent. At one point its witness claims that the Clearinghouse process was established for the purpose of settling compensation on all ABS calls (facility-based and UNE-P) since the inception of that process.¹⁹⁰ But, then, alleges, "ABS is what Southwestern Bell proposes to use for those calls between UNE-P customers. Clearinghouse is the process in place and has been in place that would, that Southwestern Bell says would address facilities-based providers."¹⁹¹ Furthermore, the CLEC Coalition witness never explained why the NPA/NXX codes were now not "pure". Finally, the Arbitrator questions the witness' familiarity with the clearinghouse process when she believes that it was established for UNE-P carriers some eight years prior to the enactment of the federal Telecommunications Act of 1996.

¹⁸⁷ CLEC Coalition Wallace Direct p. 6 line 1 - p. 8 line 20.

¹⁸⁸ CLEC Coalition Post-Hearing Brief pp. 99 - 102.

¹⁸⁹ Joint Petitioners Schmick Direct p. 24 lines 8 - 15.

¹⁹⁰ CLEC Coalition Wallace Rebuttal p. 4 lines 21 - 27.

¹⁹¹ CLEC Coalition Wallace Tr. Vol. 2 p. 283 line 21 - p. 284 line 1.

213. SWBT testimony, on the other hand, consistently said that SWBT would be glad to include UNE-P carriers in the Clearinghouse process but that process is limited to facilities-based LECs. The reason for the limitation is that facilities-based CLECs have their own switch and NPA-NXX codes which are used to identify, in the settlement process, calls that are earned and billed by specific LECs. SWBT agrees that it could eventually change the billing system such that the UNE-P providers could participate in the Clearinghouse; but, SWBT is concerned that, in doing so, other important pieces of the system would crash.¹⁹² With regard to the Joint Petitioners' position, they failed to reference provisions of the agreement that served the same functions as the Clearinghouse Attachment.

214. The Arbitrator finds for SWBT in this issue. Its testimony was more consistent and credible than that of the CLEC Coalition.

215. Recording Issue--attachment 24

AT&T REC-1

216. SWBT proposes that the existing Attachment 24 be retained as it identifies the industry-accepted requirements for recording and transmitting data for billing switched access services to IXCS and alternately billed calls to end users.¹⁹³ In response to AT&T's claim that Attachment 24 is unnecessary because it is outdated, SWBT asserts that its language has been updated to reflect current industry practices regarding Multiple Exchange Carrier Access Billing (MECAB) changes and record exchange terminology.¹⁹⁴

¹⁹² SWBT Read Tr. Vol, 2 p. 304 line 10 - p. 305 line 22.

¹⁹³ SWBT Read Direct p. 11 line 4 - p. 12 line 9.

¹⁹⁴ SWBT Read Rebuttal p. 3 lines 12 - 22.

Furthermore, SWBT believes that Attachment 24 provides greater detail about the provision of records for Meet Point Billing than Section 9 does.¹⁹⁵

217. AT&T, however, believes that Attachment 24 has not been updated to take into consideration the overhaul of the MECAB guidelines for meet-point billing which AT&T claims were substantially changed. Furthermore, AT&T objects to inclusion of provisions that are not applicable to the AT&T/SWBT business relationship in the interconnection agreement. Finally, AT&T asserts that it and SWBT had agreed to the only two relevant paragraphs in Attachment 24 and those have been incorporated into the Meet Point Billing section of the Comprehensive Billing Attachment.¹⁹⁶

Determination.

218. While this issue could probably be decided by a coin toss, the Arbitrator is persuaded by SWBT's assertion that Attachment 24 contains greater Meet-Point Billing detail than Section 9, Comprehensive Billing does. The Arbitrator finds for SWBT.

Recording--inclusion of rates

CLEC Coalition REC-1

219. The CLEC Coalition proposes inclusion of recording rates.¹⁹⁷

220. SWBT opposes any mention of rates here because there should be no charges for recording, SWBT explains it is accepted industry practice to forego any charges in the exchange of Access Usage Records.¹⁹⁸

¹⁹⁵ AT&T Comprehensive Billing DPL § 9.0 p. 6.

¹⁹⁶ AT&T Guepe Direct p. 7 line 8 - p. 9 line 14; Rebuttal p. 7 lines 4 - 23.

¹⁹⁷ CLEC Coalition Recording Attachment 24 DPL § 3.1 p. 1.

¹⁹⁸ SWBT Read Direct p. 13 lines 4 - 22.

Determination.

221. The CLEC Coalition did not provide testimony for, or brief, this recording issue. Consequently, the Arbitrator finds that the record evidence supports SWBT's position and the Arbitrator adopts same.

Recording--reciprocal basis

CLEC Coalition REC-2

222. The CLEC Coalition suggests that the existing K2A language be retained. The CLEC Coalition disagrees with SWBT's reciprocal recording proposition because it could raise its members' costs of doing business.¹⁹⁹

223. SWBT asserts that the MECAB industry standard document obligates a facilities-based CLEC to be the recording company when it originates 1+ traffic.

Determination.

224. The CLEC Coalition did not provide testimony for, or brief, this issue. Consequently, the record evidence supports SWBT's position and the Arbitrator adopts same.

Comprehensive Billing--mapping logic

AT&T CB-4

225. As explained by AT&T, the Daily Usage File (DUF) contains call records associated with traffic on a particular telephone line associated with UNE-P customers. The DUF call records serve as the basis for SWBT's bills to AT&T for UNE-P usage and AT&T uses DUF files to verify that the UNE-P bills are accurate. AT&T wants SWBT to be required to provide the logic of how the call detail records map to the usage billing

¹⁹⁹ CLEC Coalition Recording Attachment 24 DPL § 2.12 pp. 4 - 5.

elements SWBT bills to AT&T on the wholesale bill. According to AT&T, by knowing how the call records map to the billing elements, it has a much better chance of being able to confirm or question the accuracy of its bill more quickly.²⁰⁰

226. SWBT claims that AT&T wants SWBT to build a validated process that does not exist in the industry today. SWBT explained that the DUF was not created for CABS validation. DUF is a daily delivery of call detail records whereas CABS bills are issued monthly; each serves different purposes; and, each is prepared differently. It is not operationally feasible or practical to use the DUF to validate CABS bills. According to SWBT, the Ordering and Billing Forum (OBF) has documented that DUF records can be used for bill validation. It was left to the recipients to utilize the records as they would.²⁰¹

Determination.

227. It would appear that the DUF records would be valuable if they could help validate the CABS bill sent to AT&T by SWBT; but, SWBT has convinced the Arbitrator that there is no beneficial correlation between DUF records and the CABS bill. The Arbitrator finds for SWBT.

Comprehensive Billing--OCN/CIC

AT&T CB-6; Joint Petitioners CB-6

228. AT&T wants SWBT to provide to AT&T the Operating Company Number (OCN) or the Carrier Identification Code (CIC) so that AT&T can identify the originating carrier that has terminated on AT&T's facilities. In the case of UNE-P, AT&T is totally dependent upon SWBT to provide the identity of the originating carrier. AT&T insists that SWBT has access to the requested information. SWBT records the

²⁰⁰ AT&T Guepe Direct p. 5 line 1 – p. 7 line 28.

²⁰¹ SWBT Read Direct p. 6 line 13 - p. 9 line 14; Rebuttal p. 1 line 13 - p. 2 line 17.

call and knows the identity of the originating carrier. Further the OBF has resolved that UNE services providers, such as SWBT, who own the switch, must provide the terminating carrier with the OCN of the originating carrier that has leased the switch port. If SWBT does not provide the originating carrier's identity, AT&T proposes to bill SWBT on a default basis. AT&T neither demands that SWBT (1) identify 3rd party carriers who originate traffic as unbundled switch users of facilities-based LECs other than SWBT (2) or provide both a CIC and an OCN identifier for every call; rather, the OCN for LEC-carried calls and CIC for IXC-carried calls is sufficient.²⁰²

229. Joint Petitioners claim that it is critical to receive the originating carrier's OCN or CIC in order to bill for the traffic. If SWBT fails to provide the identification, any records received will be treated as though originated by SWBT.

230. SWBT agrees that it should provide AT&T and the Joint Petitioners with the OCN and/or CIC if the information is available but objects to AT&T's attempt to bill SWBT on a default basis.²⁰³

Determination.

231. AT&T's language does not contain the clarification of (1) above in its proposed language. Furthermore, AT&T fails to justify its proposal to bill SWBT on a default basis, as do the Joint Petitioners. The Arbitrator finds for SWBT.

Comprehensive Billing—ABS

AT&T CB-7

232. AT&T suggests that the Commission adopt AT&T's language to include resale services as part of the parties' settlement of an ABS/UNE issue. AT&T claims that

²⁰² AT&T Guepe Direct p. 10 line 1 - p. 14 line 9.

²⁰³ SWBT Read Direct p. 18 line 10 - p. 20 line 22.

the ABS calls that are received by the AT&T resale subscriber travel the same path as ABS calls that are received by the AT&T UNE-P subscriber. AT&T believes that benefits resulting from the ABS/UNE settlement can be further realized by the parties with extension of that agreement to resale services.²⁰⁴

233. SWBT does not believe that AT&T can change a negotiated agreement through arbitration.

Determination.

234. AT&T's request is so antithetical to the principles of negotiated agreements that the Arbitrator finds the AT&T witness not credible in his testimony in this regard. Therefore, the Arbitrator finds for SWBT on all matters in this Comprehensive Billing Issue 7.

Comprehensive Billing--single contact point

Joint Petitioners CB-1

235. Joint Petitioners want SWBT to furnish a single point of contact--a designated name of an individual--for billing disputes. The witness for Joint Petitioners related that he had at one point in time convinced SWBT to give him a single point of contact and great progress was made, fixing the root cause of many disputes.²⁰⁵

236. SWBT contends that its CLEC billing department is comprised of generalists so that they can field calls from multiple CLECs on a daily basis. SWBT doesn't believe that a single contact for each CLEC is realistic.²⁰⁶

²⁰⁴ AT&T Guepe p. 16 lines 1 - 14.

²⁰⁵ Joint Petitioners Schmick Rebuttal p. 20 line 13 - p. 21 line 2.

²⁰⁶ SWBT Christensen Tr. Vol. 2 p. 329 line 4 - p. 330 line 12.

Determination.

237. While the Pager Company apparently was able to resolve many problems when it was provided with a single contact at some point by SWBT, the Arbitrator believes that the record evidence better supports SWBT's position. However, the Arbitrator would encourage the CLECs to voice their discontent with the SWBT vice president, as SWBT assert is their rights,²⁰⁷ if disputes and problems persist.

Comprehensive Billing--multiple addresses

Joint Petitioners CB-2

238. The Joint Petitioners propose language that would permit multiple addresses for receipt of different categories of bills.²⁰⁸

239. SWBT claims that, due to the complexity of the billing system, it is impossible to separate the billing addresses as the Joint Petitioners suggested.²⁰⁹

Determination.

240. The Joint Petitioners did not provide testimony for, or brief, this issue. Consequently, the Arbitrator finds that the record evidence supports SWBT's position and the Arbitrator adopts same.

Comprehensive Billing--extra days

Joint Petitioners CB-3

241. Joint Petitioners acknowledge that this issue is closely tied to GT&C issue 6.²¹⁰

²⁰⁷ SWBT Christensen Tr. Vol. 2 p. 329 lines 4 - 5.

²⁰⁸ Joint Petitioners Comprehensive Billing DPL § 2.1.3 p. 2.

²⁰⁹ SWBT Smith Direct p. 20 lines 7 - 9.

²¹⁰ Joint Petitioners Post-Hearing Brief ¶ 81.

Determination.

242. The Arbitrator previously found for Joint Petitioners in ¶ 33 above, providing them with 45 days from bill date within which to pay SWBT.

Resale--customized routing

CLEC Coalition CUSR-5

243. The CLEC Coalition suggests that if the Commission rules, or it and SWBT agree, that Coalition members are entitled to intraLATA toll on resale services and/or unbundled switch elements, SWBT will agree to customize-route certain types of calls.²¹¹

244. SWBT says that for customized routing to be effective, all of a CLEC's customers would need to be presubscribed to the same interexchange carrier. SWBT suggests that the Coalition's language be rejected.²¹²

Determination.

245. Because the CLEC Coalition presented no position statement explaining how resale CLECs could qualify for intraLATA toll and because it proffered no testimony either on its own behalf or to challenge SWBT's assertions, the Arbitrator finds for SWBT. And, the CLEC Coalition's proposed language is rejected.

²¹¹ CLEC Coalition Resale DPL § 1.2 p. 38.

²¹² SWBT Pellerin Direct p. 28 line 29 - p. 29 line 13.

Resale--customer listings

CLEC Coalition CUSR-6, CUSR-10

Determination.

246. As with issue CUSR-5, the CLEC Coalition leaves no position statement in its DPL to support the legitimacy of the above-identified proposals, other than the language was in the K2A. The CLEC Coalition also failed to proffer testimony to either support its proposals or to challenge SWBT's testimony. The Arbitrator finds the CLEC Coalition's sole stated reason is to keep K2A language is insufficient to carry its burden of proof. The Arbitrator finds for SWBT in all of the above-identified subject matters.

Facility Based OS and DA

CLEC Coalition FB-OS-1, FB-DA-1, CC DALI-01, CC WP-01, Cox WP-01

247. SWBT's position is that FCC rule 51.217 requires all LECs to provide names and addresses of all their customers that request unlisted telephone numbers to other LECs.²¹³ SWBT witness Mr. Yoest testifies that emergency callers would be unable to locate customers whose names and addresses are not in the data base and that the inability to ascertain that a customer's number is unlisted would lead to frustration and a waste of time for directory assistance operators and callers to directory assistance.²¹⁴

248. Cox, in conjunction with the CLEC Coalition, asserts LECs only need to provide names and addresses of customers that request unlisted numbers to other LECs if their own directory assistance operations have access to that information. Cox relies on

²¹³ SWBT Brief ¶¶ 281-284.

²¹⁴ SWBT Yoest Direct pp. 5-6.

the following language of 47 C.F.R. § 51.217(c)(3)(iv): “The LEC shall ensure that access is permitted to the same directory information, including customer name and address that is available to its own directory assistance customers.”²¹⁵ Cox witness, Beveridge, testifies that Cox withholds the name and address of its customers that request unlisted numbers from its own directory assistance operators and therefore is not required to provide any information to SWBT. Cox also relies on the FCC’s *Third Report and Order in CC docket No. 96-115*, *Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98*, and *Notice of proposed Rulemaking in CC Docket No. 99-273 (96-115 Order)* for its argument. That Order states at page 167:

If a LEC, in its provision of directory assistance service to itself, allows its own directory assistance operators to see the names and addresses of subscribers with unlisted information, this information must also be made available to the requesting competitive LEC. If, ..., no customer information is available to the operator, no access need be given to the competitor.²¹⁶

Mr. Beveridge testifies that Cox’s customers are informed that no information will be available in directory assistance data bases and that they will therefore not be able to receive emergency notification.²¹⁷ He testifies Cox made the decision to not make any information on customers with unlisted numbers available to its own directory assistance operators in order to ensure that these customers’ information could not be accidentally made public. He describes instances where this had happened for SWBT and expresses

²¹⁵ CLEC Coalition Brief pp. 91-93, CLEC Coalition Beveridge pp. 14-15.

²¹⁶ CLEC Coalition Beveridge Direct pp. 15-17.

²¹⁷ CLEC Coalition Beveridge Tr. Vol. p. 431 lines 2-18.

concern that mistakes might easily occur because the information would be made available to multiple directory assistance providers.²¹⁸

Determination

249. Although SWBT argues that Cox “has not demonstrated that it hides name/address information from its own DA operators,”²¹⁹ and provided no evidence of accidental releases of unlisted numbers in Kansas, the Arbitrator finds that Mr. Beveridge testified under oath that the information is not provided to its directory assistance operators and SWBT has provided no evidence that he is incorrect. Both 47 C.F.R. § 51.217 and the *96-115 Order* make it clear that a telephone company must provide the same information to other LECs as it provides to its own directory assistance operations. Since Cox does not provide information on customers with unlisted numbers to its own directory assistance operators, it is not required to provide the information to SWBT. Further, just because there is no evidence in the record regarding inadvertent releases of unlisted number information in Kansas, it does not mean it has never happened, or cannot happen. With respect to customer confusion and frustration of operators, evidence in the record demonstrates that phone numbers of customers that choose to be “wireless only” will also not be in the data base.²²⁰ Any confusion added from Cox’ withholding unlisted customer information seems minimal. The Arbitrator finds in favor of Cox.

²¹⁸ CLEC Coalition Beveridge Direct pp. 16-17 Rebuttal, pp. 11-12.

²¹⁹ SWBT Brief ¶¶ 290-293.

²²⁰ SWBT Yocst Tr. Vol. 2 p. 432.

Collocation and Right of Way--power metering

AT&T COLO-1; CLEC Coalition COLO-1

250. AT&T believes that it should be billed for DC power based on the amount of power it uses through the means of power metering. As explained by AT&T, power cabling consists of pairs of copper cable in protective sheaths that complete a power circuit from SWBT's Battery Distribution Fuse Bay (BDFB) to the collocation arrangements. Each pair normally comes in matching pairs for redundancy, with one pair referred to as the "A-side" power feed and the redundant pair referred to as the "B-side" power feed. If one side fails, the other side will kick in so that the telecommunications equipment will not be cut off from power. AT&T noted that the Illinois, Georgia and Tennessee commissions had approved power metering. AT&T experienced a dramatic decrease in expenses in Illinois.²²¹

251. The CLEC Coalition proposes to place a mini-BDFB in its members' collocation cages to facilitate efficient power usage. The CLEC Coalition describes one mini-BDFB that is rack-mounted and is only 15 inches deep by 24 inches wide. The CLEC Coalition noted that one of its members NuVox had been permitted to deploy its own BDFB in each of its collocations in its four-state serving area, including Kansas. NuVox's BDFBs have been in place since the 1999/2000 time period and SWBT has no time notified NuVox of any problems caused by the use of the BDFBs. Options to a BDFB would be (1) billing on one-half of the basis of power ordered (2) power metering and (3) rated amperage of actual equipment placed in the cage, known as List 1 Drain.²²²

²²¹ AT&T Noorani Direct p. 3 line 15 - p. 15 line 11.

²²² CLEC Coalition Krabill/Cadieux Direct p. 7 line 19 - p. 14 line 19.

252. SWBT is concerned that the CLECs' measuring proposals would deprive SWBT of the ability to recover its cost for installing and provisioning power plants. SWBT explained that, under the current tariff, a CLEC requests power in the amperage increments suitable for its needs. For example, if the CLEC orders 40 amps of power, SWBT would deliver two 20-amp feeds. SWBT suggests that the CLEC notion of requiring SWBT to allow installation of mini-BDFBs be rejected. It duplicates what SWBT already provides and wastes collocation space.²²³

253. AT&T disagrees that its metering device would waste collocation. AT&T intends to install a split core conductor that resembles a donut cut on one side and hinged on the other. It is placed directly on the battery feeder, can be installed in minutes and takes up only a few inches of space in AT&T's collocation space and can give instant value, hourly averages or daily averages. AT&T maintains that metering devices are safe; in fact, AT&T has maintained power meters in Illinois for years without a single negative incident. AT&T criticizes SWBT's concern that it will be unable to recover its investment, saying that SWBT did not provide any evidence that this would be the case.²²⁴

254. The CLEC Coalition wants to install mini-BDFBs "to use the same flexibility in managing their power costs as SBC does."²²⁵

²²³ SWBT Niziolek Direct p. 2 line 7 - p. 8 line 11.

²²⁴ AT&T Noorani Rebuttal p. 2 line 14 - p. 16 line 16.

²²⁵ CLEC Coalition Krabill/Cadieaux Rebuttal p. 5 lines 22 - 25.

255. SWBT contends that, if its engineering department had known beforehand that NuVox was going to install a BDFB, it would have refused to permit the installation because a mini-BDFB is not necessary for collocation.²²⁶

Determination.

256. The Arbitrator finds that SWBT's selective citation to the FCC Collocation Remand Order²²⁷ misses the FCC's complete opinion. The FCC noted that the D.C. Circuit court that remanded the collocation matter back to FCC held:

A statutory reference to "necessary" must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, i.e., so as to limit "necessary" to that which is required to achieve a desired goal.²²⁸

The FCC noted a number of goals in its Collocation Remand Order: (1) promote competition and innovation through the grant of collocation rights while protecting ILEC's legitimate property interests against unwarranted intrusion; (2) CLECs' ability to obtain interconnection equal to that which the incumbent provides itself within the meaning of § 251(c)(2); (3) CLECs ability to obtain nondiscriminatory access to unbundled network elements within the meaning of § 251(c)(3); (4) "equal in quality" standard of §251(c)(2) whereby ILEC designed interconnection facilities must meet same technical criteria and service standards used in ILEC's own network; and, (5) CLECs must be able to realize the same benefits of multi-functional equipment as the ILECs to

²²⁶ SWBT Prestenberg Rebuttal p. 3 lines 1 - 4.

²²⁷ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Fourth Report and Order, rel. Aug. 8, 2002, 16 F.C.C.R. 15435 (FCC Collocation Remand Order).

²²⁸ *GTE Service Corp v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000).

further Congress' vision of a fully competitive telecommunications marketplace.²²⁹ The Arbitrator finds that the principal thrust of the FCC Collocation Remand Order is this:

We conclude that section 251(c)(6) allows the interconnecting carrier to collocate any equipment necessary for interconnection with the incumbent LEC at a level equal in quality to that which the incumbent obtains within its own network or the incumbent provides to any affiliate, subsidiary, or other party.²³⁰

The Arbitrator finds that AT&T's split core conductor and the CLEC Coalition's mini-BFDB do not constitute unwarranted intrusion upon SWBT's property interests and that these devices will provide the CLECs with the opportunity to provide service to their customers with the same level of quality as SWBT does to its customers on a non-discriminatory basis. The Arbitrator, thus, finds that the record evidence supports the positions of AT&T and the CLEC Coalition and the Arbitrator adopts same.

Collocation and Rights of Way--metering

CLEC Coalition COLO-3

Determination.

257. In view of his determination of AT&T COLO-1, the Arbitrator finds that the CLEC Coalition may undertake power metering, specifically here by metering off a single BDFB that may be installed by members of the CLEC Coalition in their collocation sites in Kansas. With this finding, the Arbitrator determines that the CLEC Coalition COLO-4 issue need not be addressed.

²²⁹ FCC Collocation Order ¶¶ 20, 29, 30 and 33 respectively.

²³⁰ *Id.* ¶ 30.

Collocation and Rights of Way--reports

CLEC Coalition COLO-6

258. The CLEC Coalition wants to obtain the Collocation Connecting Facility Assignment (CFA) Inventory Report from SWBT at cost-based rates rather than the current \$25 per report charge.

259. SWBT offers to defer this issue to a later phase of these proceedings subject to the production of a cost study for the report but proposes, in the meantime, to continue to charge \$25 per report.

Determination.

260. The Arbitrator finds SWBT's proposal to be reasonable and, in essence, what the CLEC Coalition has requested. The Arbitrator anticipates that SWBT's cost study will be completed prior to the opening of the Phase 2 hearings.

Collocation and Rights of Way--tariff

CLEC Coalition COLO-7

261. The CLEC Coalition believes that the issues determined in these arbitrations should be incorporated into their interconnection agreements rather than wait for a separate tariff proceeding.²³¹

262. SWBT insists that these proceedings are not the proper forum in which existing tariffs can be revised and edited.²³²

²³¹ CLEC Coalition Krabill/Cadieus Direct p. 16 line 21 - p. 17 line 26.

²³² SWBT Niziolek Direct p. 14 line 17 - p. 18 - line 16.

Determination.

263. The CLEC Coalition poses the question for its COLO-7, whether the Collocation Appendix contains additional contract language addressing situations on which the tariff is silent. The answer to that question is "no". This is not the forum in which to revise tariffs. Consequently, the Arbitrator finds for SWBT.

Collocation and Rights of Way--review of work

AT&T ROW-1; CLEC Coalition ROW-3

264. AT&T proposes to share with SWBT the cost of a SWBT employee to review and inspect the work performed by AT&T personnel on SWBT premises.²³³ AT&T explains that its personnel working in SWBT's conduit systems must be properly certified based on industry standards and pre-approved by SWBT. AT&T believes that being forced to pay for SWBT's inspection is a waste of AT&T's money and allows SWBT to affect competitive entry.²³⁴

265. SWBT states that it is charged with the ultimate responsibility for the maintenance of its conduit systems, cables and air pressure piping. Further, SWBT and other CLECs may need to use the same conduit run occupied by AT&T. Thus, SWBT says, it must take reasonable actions to assure that there is no substandard work.²³⁵

Determination.

266. The Arbitrator finds for SWBT. Without AT&T's work in the conduits, there would not be any need for a SWBT inspection. The CLEC Coalition proposed

²³³ AT&T Attachment 13 ROW DPL § 6.11 pp. 1 - 2.

²³⁴ AT&T Direct Noorani p. 16 line 18 - p. 18 line 9.

²³⁵ SWBT Jones Direct p. 5 line 16 - p. 6 line 5

similar language²³⁶ but did not provide testimony for, or brief, this issue. Consequently, the Arbitrator finds for SWBT against the CLEC Coalition also.

Poles, Conduit & Rights of Way--fines

AT&T ROW-2; CLEC Coalition ROW-4

267. SWBT proposes language requiring a CLEC to pay SWBT a \$5,000 penalty for each unauthorized entry into SWBT's conduit system. SWBT believes that such unauthorized entry could cause damages far greater than the \$5,000 penalty.²³⁷

268. The CLEC Coalition provided a position statement noting that there are already provisions which require advance notice that one of its members intends to access SWBT's conduit systems.²³⁸

269. AT&T complains that this penalty is far in excess of any such penalty contained in any other interconnection agreement. AT&T also believes that a penalty should not be authorized when it is designed to compensate SWBT for potential loss from unauthorized entry.²³⁹

Determination.

270. Throughout his determinations herein, the Arbitrator has steadfastly refused to adopt proposed language that assesses penalties and does not deviate from that refusal here. The Arbitrator clearly is not encouraging unauthorized entry; but, SWBT's relief for damages for such entry should be found in a civil court, not in an

²³⁶ CLEC Coalition Attachment 13 DPL § 6.11(d) pp. 3 - 4.

²³⁷ SWBT Jones Direct p. 8 line 17 - p. 9 line 19.

²³⁸ CLEC Coalition Attachment 13 DPL § 6.11(e) pp. 4 - 5.

²³⁹ AT&T Post-Hearing Brief pp. 37 - 39.

interconnection agreement. The Arbitrator finds for AT&T and the CLEC Coalition in this regard.

Poles, Conduit & Rights of Way—advanced notice

AT&T ROW-3; CLEC Coalition ROW 5

271. AT&T proposes to retain existing K2A language which permits it to take immediate occupancy of certain unassigned ducts, conduit or pole spaces as long as it complies with applicable procedures and rules.²⁴⁰ The CLEC Coalition proposes similar language.²⁴¹

272. SWBT contends that occupying structures without first applying to SWBT for the space should be discontinued for public safety, network integrity, security and parity.²⁴²

Determination.

273. The Arbitrator finds for SWBT. There is no reason to continue the life of a provision that invites disorder such as this one. One can imagine the chaos that would ensue with AT&T and the five members of the CLEC Coalition rushing out at the same time to claim the same pole space. There is a process by which a CLEC can gain access to these structures. AT&T and the CLEC Coalition should follow that process.

²⁴⁰ AT&T Noorani Direct p. 18 line 6 - p. 7 line 6.

²⁴¹ CLEC Coalition Attachment 13 DPL § 8.02(b) pp. 6 - 19.

²⁴² SWBT Jones Direct p. 10.

Poles, Conduit & Rights of Way--pole identification

AT&T ROW-4; CLEC Coalition ROW-6

274. SWBT proposes language that would enable it to charge CLECs a fee for identifying the owner of a pole when the CLEC is unable to identify the owner by itself. SWBT expects to be paid for work requested by CLECs. Furthermore, according to SWBT, 47 U.S.C. 224(d)(1) authorizes reasonable charges in these events.²⁴³

275. AT&T objects to SWBT's proposal because SWBT is in the best position to identify ownership of poles, especially those poles owned by some other entity but upon which SWBT has hung its wires, cable and other facilities.²⁴⁴

276. The CLEC Coalition proposes language that omits any charges by SWBT.²⁴⁵

Determination.

277. SWBT misreads 47 U.S.C. 224(d)(1). This statutory provision limits its application: "For purposes of subsection (b) of this section. " 224(b) states that the FCC will regulate the rates, terms and conditions for pole attachments and provides for complaint procedures. Clearly, 47 U.S.C. 224(d)(1) does not permit SWBT to assess non-approved costs on the CLECs. The Arbitrator finds for AT&T and the CLEC Coalition, but only to the extent that SWBT's position is rejected.

²⁴³ SWBT Jones Direct p. 11 lines 1 - 18.

²⁴⁴ AT&T Noorani Direct p. 19 line 7 - p. 20 line 12.

²⁴⁵ CLEC Coalition Attachment 13 DPL § 9.02(f) pp. 22 - 23.

Poles, Conduit & Rights of Way--dead cable expenses

CLEC Coalition ROW-7

278. The CLEC Coalition proposes language that charges SWBT with the expenses of clearing retired or dead cable from SWBT's poles or conduit, if possible, in order to free space on SWBT's facilities.²⁴⁶

279. SWBT disagrees with the CLEC Coalition's position. SWBT claims that, in accordance with 47 U.S.C. 224(d)(1), CLECs must assume responsibility for the expenses of removing cable at its request. SWBT also refers to the FCC *Local Competition First Report and Order* which also obligates the CLEC to pay for modifications to SWBT's systems.²⁴⁷

Determination.

280. The CLEC Coalition did not provide testimony for, or brief, this issue. Consequently, the Arbitrator finds that the record evidence supports SWBT's position and the Arbitrator adopts same.

Poles, Conduits & Rights of Way--handhold

AT&T ROW-5

281. AT&T suggests language by which SWBT, after it has declared a manhole congested, will either reimburse AT&T for the cost of installing the handhold if other CLECs are permitted to use the handhold or charge AT&T only for the proportionate share of use of the handhold by AT&T and SWBT.²⁴⁸

²⁴⁶ CLEC Coalition Attachment 13 DPL § 10.2 p. 24.

²⁴⁷ SWBT Direct Jones p. 12.

²⁴⁸ AT&T Attachment ROW DPL § 10.02(a).

282. SWBT objects to AT&T's proposal.²⁴⁹

Determination.

283. AT&T's proposed language is a reasonable allocation of costs vis-à-vis use. The Arbitrator adopts AT&T's language. AT&T also raised several issues related to congested manholes in its testimony or in its post-hearing brief.²⁵⁰ However, AT&T did not propose any language or request relief for those issues. Therefore, the Arbitrator is precluded from ruling on them.

Poles, Conduits & Rights of Way--inspection expense

AT&T ROW-6; CLEC Coalition ROW-10

284. SWBT proposes language that entitles it to undertake post-construction inspection of work performed by AT&T and members of the CLEC Coalition.²⁵¹

285. AT&T objects to SWBT's proposal claiming that this additional inspection is not justified.²⁵²

Determination.

286. The Arbitrator finds for AT&T and the CLEC Coalition. SWBT has already been provided with the ability to charge for inspection of CLEC work by SWBT in ¶ 255 above. Provision for yet another inspection charge is not reasonable.

²⁴⁹ SWBT Post-Hearing Brief ¶ 536.

²⁵⁰ AT&T Noorani Direct p. 21 lines 4 - 19; AT&T Post-Hearing Brief pp. 41 - 43.

²⁵¹ SWBT Jones Direct p. 17 line 5 - p. 18 line 6.

²⁵² AT&T Noorani Direct p. 22 lines 11 - 22.

Space Licensing

AT&T-2

287. AT&T suggests that the Commission adopt AT&T's language relative to space licensing contained in Network Architecture Part G Space License.²⁵³

288. SWBT contends that the rates are not reasonable.²⁵⁴

Determination.

289. AT&T did not brief the issue. Consequently, the Arbitrator finds that the record evidence better supports SWBT's position and the Arbitrator adopts same.

Coordinated Hot Cuts--Attachment 29

SWBT CHC-1

290. SWBT proposes that CHC Attachment 29 should be included as a single point of reference.²⁵⁵

291. The CLEC Coalition suggests that SWBT and CLECs that need a CHC attachment can negotiate an amendment to their interconnection agreement.²⁵⁶

Determination.

292. The CLEC Coalition should know whether it needs a coordinated hot cut process or not. Furthermore, the Arbitrator is unable to find SWBT's proposed language, if there is such language, in any of the DPLs. The Arbitrator finds for the CLEC Coalition and rejects SWBT's proposed language, whatever it may be.

²⁵³ AT&T Henson Direct p. 3 lines 13 - 19.

²⁵⁴ SWBT Silver Rebuttal p. 13 lines 13 - 18.

²⁵⁵ CLEC Coalition CHC Attachment 1 DPL.

²⁵⁶ *Id.*

Coordinated Hot Cuts--notice

Joint Petitioners CHC-1

293. Joint Petitioners propose language that would identify the obligated party as SBC-13 State and permit advanced notice of SWBT unanticipated work load via Accessible Letter or Firm Order Commitment (FOC). Joint Petitioners believe that SWBT's "where time permits" or "make every effort" language is insufficient.²⁵⁷

294. SWBT suggests that it be provided the capability to cancel hot cuts due to unanticipated workload.²⁵⁸

Determination.

295. SWBT never explained the reason why it opposed reference to the Accessible Letter and FOC. The Arbitrator finds for the Joint Petitioners. The proposed language of the Joint Petitioners does not obligate SWBT to use either the Accessible Letter or the FOC; it simply says that these alternatives could be used. The proposed language is reasonable and the Arbitrator adopts same.

Coordinated Hot Cuts--cost estimates

Joint Petitioners CHC-2

296. Joint Petitioners propose that SWBT be required to provide a good-faith cost estimate for the hot cut prior to performance of the work.²⁵⁹

297. SWBT points out that the cost for coordinated hot cut process is a tariff rate and is applicable to all CLECs. The actual coordination time, billed at 1/2 hour increments, depends upon the expertise and efficiency of the CLEC. SWBT believes that

²⁵⁷ Joint Petitioners CHC DPL § 2.4; Schaub Direct p. 15 line 21 - p. 16 line 7.

²⁵⁸ SWBT Chapman Direct p. 39 line 6 - p. 40 line 13.

²⁵⁹ Joint Petitioners Schaub Rebuttal p. 14 lines 1 - 16.

the cost estimate would add unnecessary expense and delay to the process. The cost estimate would be manually prepared.²⁶⁰

Determination.

298. The Arbitrator finds for SWBT and adopts its position. The Arbitrator believes that, in light of the tariff rate, the Joint Petitioners can provide as good an estimate as SWBT.

Coordinated Hot Cuts--initiation

Joint Petitioners CHC-3

299. Joint Petitioners suggest that the hot cut process begin at the time noted on the FOC and will be completed within thirty minutes. If the process begins upon CLEC's call to SWBT as described by SWBT, the Joint Petitioners are willing to modify their language.²⁶¹

Determination.

300. According to SWBT, the hot cut process does begin once the CLEC calls SWBT.²⁶² Therefore, the Arbitrator finds for Joint Petitioners conditioned upon change in proposed language as described by Joint Petitioners above.

Coordinated Hot Cuts--porting

Joint Petitioners CHC-4

301. Joint Petitioners propose that, if SWBT does not port a number within two hours after completion of cut, SWBT cannot bill Joint Petitioners for the hot cut. After Joint Petitioners were advised that SWBT explained that the CLEC does the porting,

²⁶⁰ SWBT Chapman Direct p. 40 line 14 - p. 43 line 14.

²⁶¹ Joint Petitioners CHC DPL Attachment 1; Schaub Rebuttal p. 15 lines 1 - 9.

²⁶² SWBT Chapman Direct p. 43 line 22 - p. 44 line 5.

Joint Petitioners offered to amend their language to "if [SWBT] fails to make available a number for porting. . .".²⁶³

302. SWBT claims that there are performance measures that track SWBT's timely completion of hot cuts based upon the time the cutover was initiated by the CLEC. SWBT believes that the Joint Petitioners' proposal is inconsistent with those measures.²⁶⁴

Determination.

303. The Arbitrator finds for SWBT. Adopting Joint Petitioners' proposal would subject SWBT to two penalties for the same event.

Number Portability--enhanced

AT&T NP-1

304. AT&T proposes language that requires SWBT to verify that a CLEC has successfully provisioned service to a customer before disconnecting that customer from the SWBT switch. AT&T believes that approval of this language is critical because it virtually eliminates outages that result when a CLEC is unable to advise SWBT of provisioning problems.²⁶⁵

305. SWBT opposes AT&T's proposal. SWBT claims that approval of this language would obligate it to identify all classes of service that have potential for porting and immediately modify the process to support them. SWBT also claims that AT&T overlooked 47 C.F.R. 52.23 that makes LNP guidelines and rules established by the FCC

²⁶³ Joint Petitioners Schaub Direct p. 17 lines 12 - 23; Rebuttal p. 14 lines 10 - 23.

²⁶⁴ SWBT Post-Hearing Brief

²⁶⁵ AT&T Willard Direct p. 3 line 6 - p. 8 line 3.

reciprocal. SWBT does provide additional language to accommodate AT&T while assuring reciprocity but permits SWBT to modify the process at its own discretion.²⁶⁶

Determination.

306. AT&T opposes SWBT's ability to modify the process at its own discretion. So does the Arbitrator. If the LNP process is reciprocal by FCC rule, as SWBT represents, then AT&T is obligated to do so by law and that explanation is not necessary to incorporate into the interconnection agreement. The Arbitrator finds for A&T.

Number Portability--basic network offering, etc.

CLEC Coalition NP- 1, 2, 4 and 5

307. The CLEC Coalition proposes language dealing with various number portability issues.

308. SWBT has opposed those issues with testimony and brief.

Determination.

309. The CLEC Coalition did not provide testimony for, or brief, the issues which it proposed. Consequently, the record evidence supports SWBT's position and the Arbitrator adopts same.

Numbering--ATIS guidelines

310. SWBT proposes language that includes a quotation ostensibly from ATIS. SWBT is not clear why the CLEC Coalition would object to the quoted language because it does not dispute the use of ATIS guidelines.²⁶⁷

311. The CLEC Coalition opposes SWBT's "unattributed quote".²⁶⁸

²⁶⁶ SWBT Chapman Direct p. 34 line 1 - p. 36 line 5, SWBT Brief ¶¶ 558 – 563.

²⁶⁷ SWBT Chapman Direct p. 32 line 16 - p. 33.

Determination.

312. The CLEC Coalition did not provide testimony for, or brief, this issue. Consequently, the record evidence supports SWBT's language and is adopted by the Arbitrator.

XDSL

Determination.

313. The CLEC Coalition raised three DSL issues. However, it did not provide testimony for, or brief, these issues as SWBT did. The Arbitrator, therefore, finds that the record evidence supports SWBT's position and the Arbitrator adopts same.

Network Interconnection Architecture--definitions

**AT&T NIA-1; CLEC Coalition NIA-5, ITR-2; Xspedius ITR-6;
Joint Petitioners ITR-3**

314. SWBT proposes to define the terms used in Attachment 11, maintaining that the definitions are critical to interpreting the interconnection agreement. SWBT alleges that the proposed definitions are consistent with industry standard definitions.²⁶⁹

315. AT&T opposes inclusion of the definitions in Attachment 11 because they are either unnecessary or designed to support SWBT's trunking network architecture. For example, SWBT defines local interconnection trunk groups and local-only trunk groups as two-way trunk groups. If SWBT's definitions were approved, AT&T would be obligated to use two-way trunks even though 47 C.F.R. 51.305(f) permits AT&T to choose one-way trunks if it prefers.²⁷⁰

²⁶⁸ CLEC Coalition DPL Numbering § 1.2 p. 1.

²⁶⁹ SWBT Oyer Direct p. 21 line 17 - p. 22 line 12.

Determination.

316. The Arbitrator finds for AT&T and rejects SWBT's proposed definitions. AT&T is correct that 47 C.F.R. 51.305(f) provides CLECs with the choice of one-way or two-way trunks: "If technically feasible, an incumbent LEC shall provide two-way trunking upon request." The clear implication of this rule is that one-way trunking is the norm *vis-à-vis* two-way trunking, although a CLEC may order two-way trunking if it prefers. SWBT's definitions of local interconnection trunk groups and local only trunk groups would prevent AT&T from exercising its right to use one-way trunking.

Network Interconnection Architecture--outside plant/customer premises

AT&T NIA-2

317. AT&T proposes language that permits AT&T to interconnect at any feasible point on SWBT's network, including outside plant and at a "carrier hotel". AT&T cites the FCC's Wireline decision in the *Virginia Arbitration Order*²⁷¹ for further support of its position that a CLEC may interconnect with SWBT at any feasible point on SWBT's network.²⁷²

318. SWBT says that points such as outside plant are simply not appropriate for connection of a CLEC switch to an SWBT switch; rather, these facilities are typically designed to serve end users and not carriers.²⁷³

²⁷⁰ AT&T Schell Direct p. 4 line 4 - p. 10 line 3.

²⁷¹ *Petition of WorldCom, et al., Memorandum Opinion and Order*, CC Docket Nos. 17 F.C.C.R. 27039, released July 17, 2002 (*Virginia Arbitration Order*).

²⁷² AT&T Schell Direct p. 10 line 4 - p. 18 line 7.

²⁷³ SWBT Oyer Direct p. 74 lines 1 - 8.

Determination.

319. The Arbitrator finds for AT&T. SWBT's position does not comply with the law. As the *Virginia Arbitration Order* found:

AT&T's proposed language restates its rights under the Act and the Commission's implementing rules, and lists several examples ("tandems, end offices, outside plant and customer premises") of what might constitute technically feasible points.

Id. 27067 ¶ 57.

Network Interconnection Architecture--transit traffic

AT&T NIA-3; CLEC Coalition NIA-10; Joint Petitioners NIA-4(b)

320. AT&T proposes language which specifically includes transit traffic with those services that will be exchanged under the AT&T/SWBT interconnection agreement. AT&T believes that SWBT is required under § 251(c) of the Act to permit carriers that are not directly connected with one another to exchange traffic with one another via SWBT's network at cost-based (TELRIC) rates. AT&T points out that not only have other states adopted its position but also that the *Virginia Arbitration Order* reminded Verizon that a CLEC could access UNEs for the provision of telecommunications services, including local exchange traffic involving exchange of traffic with third-party carriers. AT&T further supported its position by noting that the *Local Competition First Report and Order* found that the indirect interconnection requirement of § 251(a)(1) could be satisfied by two non-ILECs' interconnection with an ILEC's network. AT&T was also concerned that if SWBT's position was adopted, AT&T

and the other CLECs would be compelled to negotiate interconnection with one another-- a senseless exercise when transit traffic is minimal.²⁷⁴

321. Joint Petitioners likewise claim that transit traffic is interconnection and subject to TELRIC pricing.²⁷⁵

322. SWBT doesn't even believe this issue is arbitrable because there is no provision of the Act that requires ILECs to provide or subscribe to transit service. Further, SWBT asserts that the Commission had previously held that SWBT could not be required to accept, subscribe to or provide transit service.²⁷⁶ SWBT claims that the hypothetical network of AT&T's witness dramatically underestimated the cost and number of trunk groups required to interconnect SWBT to these other carriers and that it would need to add even more trunk groups to handle the traffic.²⁷⁷

Determination.

323. In the Virginia arbitration before the FCC's Wireline Bureau, AT&T, as it does here, argued that the ILEC was legally obligated to provide transit service to AT&T in accordance with § 251(c)(2) at TELRIC rates.²⁷⁸ What AT&T did not advise the Arbitrator and the Commission about was that the FCC's Wireline Bureau rejected

²⁷⁴ AT&T Schell Direct p. 18 line 8 - p. 26; AT&T Post-Hearing Brief pp. 56 - 62.

²⁷⁵ Joint Petitioners Post-Hearing Brief ¶ 96.

²⁷⁶ SWBT Post-Hearing Brief ¶ 364.

²⁷⁷ SWBT Oyer Rebuttal p. 25 line 23 - p. 27. (N.B. SWBT's Post-Hearing Brief cited Mr. Oyer's testimony on transit traffic as pp. 29 - 30 of his rebuttal. There are only 27 pages to Mr. Oyer's rebuttal testimony.)

²⁷⁸ *Virginia Arbitration Order* 27095 ¶ 108, 27096 ¶ 109.

AT&T's proposal:

We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 251(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such a duty. . . Furthermore, any duty Verizon may have under section 252(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.²⁷⁹

What AT&T quoted from the *Virginia Arbitration Order* was true enough at the time of that order; it may not be now depending upon the FCC's new UNE rules. However, in the context given, the Arbitrator read AT&T's citation as a confirmation of AT&T's position which, of course, was not factual. Furthermore, it is clear that AT&T chose not to advise the Arbitrator of the Wireline Bureau's true disposition of AT&T's proposal. For this reason, the Arbitrator finds AT&T's testimony and brief to be unreliable in this regard and finds for SWBT.

324. The CLEC Coalition propose to do the very thing disallowed in the *Virginia Arbitration Order*--requiring SWBT to provide transit service without limitations. The CLEC Coalition has not argued that the *Virginia Arbitration Order* has been modified or overturned in any manner. The Arbitrator, therefore, finds for SWBT against the CLEC Coalition.

325. With respect to Joint Petitioners' claim that transit service is interconnection, the Arbitrator finds for SWBT based upon the record and the *Virginia Arbitration Order*.

²⁷⁹ *Id.* 27101 ¶ 117.

Network Connection Architecture--points of interconnection

**AT&T NIA-4(a)(b), 14, 15, 16, 18; CLEC Coalition NIA-11;
Cox NIA-13; Xspedius NIA-15; Joint Petitioners NIA-14**

326. SWBT proposes language acknowledging that AT&T has the right to choose a single point of interconnection (POI) or multiple POIs in a LATA. But, SWBT wants to require AT&T to also interconnect at SWBT tandem or at an end office not served by a tandem when traffic through the existing POI exceeds 24 DSIs at peak over three consecutive months. SWBT considers a single POI to be intended as an entry vehicle. SWBT worries that a CLEC will be totally isolated from the network if it has only one POI and that POI experiences a catastrophic failure. With respect to the language proposed by AT&T, reference to "within" SWBT's network is omitted, opening up possible obligations to provide interconnection outside of SWBT's legacy territory. Finally, SWBT insists that the law does not require SWBT to interconnect with a CLEC, but the other way around.²⁸⁰

327. AT&T claims that SWBT's proposed language attempts to usurp its right to establish just one POI in a LATA. AT&T also claims that SWBT's proposed language is a scheme to make AT&T financially responsible for the transport of SWBT's originating traffic between the tandem serving area and AT&T's switch.²⁸¹

328. The CLEC Coalition says that SWBT's proposal makes CLECs financially responsible for most of SWBT's costs on circuits on SWBT's side of the POI; forces additional POIs upon DS1 threshold attainment; and, permits SWBT to charge special

²⁸⁰ SWBT Oyer Direct p. 59 line 11 - p. 69 line 9.

²⁸¹ AT&T Schell Direct p. 27 line 1 - p. 44 line 5.

access rates for leased facilities to reach these new POIs which can be as much as 1400% greater than TELRIC rates.²⁸² The CLEC Coalition noted that in SWBT-Texas' 271 approval, the FCC stated that Section 251 of the Act gives CLECs the option to interconnect at as few as one technically feasible point within each LATA. In addition the FCC said that CLECs may select the most efficient points at which to exchange traffic with ILECs, thereby lowering the CLECs' cost of transport and termination.²⁸³

329. Cox maintains that SWBT bears the financial responsibility of transporting its originating traffic to Cox at its point of interconnection (POI). Cox described the POI as the physical point where Cox interconnects with SWBT's network for the purpose of exchanging traffic.²⁸⁴ Xspedius suggests the same proposition.²⁸⁵

330. Joint Petitioners disagree with SWBT that the requirement of another POI, once the DS1 threshold is attained, increases reliability. Like the CLEC Coalition, Joint Petitioners believe that the real purpose of SWBT's proposal is an economic one.²⁸⁶

Determination.

331. The Arbitrator finds for AT&T with regard to its Issue 4(a). Although 47 U.S.C. 251(c)(2) requires ILECs to permit CLECs to interconnect with ILECs' networks, this provision falls under the §251(c) umbrella of "Additional Obligations of Incumbent Local Exchange Carrier". In contrast, § 251(a)(1) requires each telecommunications carrier, which includes SWBT, to "interconnect directly or indirectly with the facilities

²⁸² CLEC Coalition Land Direct p. 18 line 15 - p. 19 line 5.

²⁸³ CLEC Coalition Post-Hearing Brief p. 54.

²⁸⁴ Cox Beveridge Direct p. 6 - p.8 line 17.

²⁸⁵ Xspedius Falvey Direct p. 14 lines 7 - 11.

²⁸⁶ Joint Petitioners Post-Hearing Brief p. 38.

and equipment of other telecommunications carriers". The Arbitrator need not address the relationship between § 251(a)(1) and § 251(c) because that is not at issue. It is sufficient to note that SWBT has certain interconnection duties under § 251(a).

332. The Arbitrator finds for AT&T, CLEC Coalition, Cox, Xspedius and Joint Petitioners with respect to the POI issues discussed above. Their positions are more consistent with the law and are better supported by record evidence than SWBT's proposal. The Arbitrator rejects SWBT's language and adopts the various provisions singularly for AT&T, CLEC Coalition, Cox, Xspedius and Joint Petitioners. Furthermore, the CLECs' proposal is consistent with the *Virginia Arbitration Order's* rejection of Verizon's proposed language requiring the establishment of direct end office trunks when traffic to a particular Verizon end office exceeded a certain DS1 level.²⁸⁷

Network Connection Architecture--end office POI

AT&T NIA-5

333. AT&T proposes language that would permit it to interconnect with SWBT at another ILEC's tandem switch where a SWBT end office subtends that other ILEC's switch.²⁸⁸ AT&T admits all of SWBT's end offices subtend an SWBT access tandem switch; so, this issue is "forward-looking in nature".²⁸⁹

334. SWBT objects to AT&T's proposal because a requesting carrier must obtain interconnection at any technically feasible point only within SWBT's network.²⁹⁰

²⁸⁷ *Virginia Arbitration Order* 27085 ¶ 88.

²⁸⁸ AT&T NIA DPL § 1.2 p. 10.

²⁸⁹ AT&T Post-Hearing Brief p. 70.

²⁹⁰ SWBT Post-Hearing Brief ¶ 326.

Determination.

335. The Arbitrator finds for SWBT on this issue. An interconnection agreement is not the place to address hypothetical future events, especially those of a proposing party that has not tied to some degree of possibility to the events' occurrence.

Network Interconnection Architecture--interface method

AT&T NIA-7, 12; Xspedius NIA-5, ITR-2, ITR-6

336. AT&T proposes language that permits it to specify, at its sole discretion, any technically feasible method by which it can interconnect with SWBT's network.²⁹¹ AT&T is concerned that SWBT's proposal could enable SWBT to choose to offer, or not offer, particular interfaces only at certain offices.²⁹²

337. Xspedius claims it has the right under the FTA and RCC implementing rules to specify the method of interconnection between the parties, including the choice of one-way or two-way trunks.²⁹³

338. SWBT proposes that the parties mutually agree to any "other" technically feasible method.²⁹⁴ SWBT contends that it does not know what may be technically feasible on its network. Giving AT&T the unfettered right to determine what is technically feasible is unreasonable.²⁹⁵

²⁹¹ AT&T NIA DPL §§ 1.0, 1.7 p. 11.

²⁹² AT&T Schell Direct p. 60 line 7 - p. 61 line 9.

²⁹³ Xspedius Falvey Direct p. 6 lines 16 - 21.

²⁹⁴ AT&T NIA DPL § 1.7 p. 11.

²⁹⁵ SWBT Oyer Rebuttal p. 23 lines 11 - 25.

339. SWBT is concerned about Xspedius' proposal to use one-way trunks, at its sole discretion, for means of interconnection. First, SWBT believes that Xspedius will establish a POI at its location, outside of SWBT's network. Second, SWBT notes that, with a one-way trunk, a CLEC customer could call a SWBT customer, but that same SWBT customer could not call the CLEC customer. Third, separate trunk ports would be required for Xspedius' one-way trunk and SWBT's one-way trunk, if it decided to provide that trunk so that its customer could return the CLEC customers' calls. Fourth, a two-way trunk has a carrying capacity greater than two one-way trunks.²⁹⁶

Determination.

340. The Arbitrator agrees with AT&T that the FCC determined that an ILEC must provide any technically feasible method of obtaining interconnection or access to UNEs at a particular point upon request by a telecommunications carrier.²⁹⁷ The Arbitrator also agrees with AT&T that the FCC required an ILEC to prove to the state commission that the requested method of interconnection or access to UNEs at that point is not technically feasible when the ILEC denies a request for interconnection or UNE access at that point.²⁹⁸ The Arbitrator finds for AT&T because its proposal is more consistent with the law and FCC rules.

341. With respect to Xspedius' proposal, SWBT presents good, economical arguments for two-way trunks. But, those arguments are not relevant because FCC's

²⁹⁶ SWBT Oyer Direct p. 37 - p. 43 line 2.

²⁹⁷ 47 C.F.R. § 51.321(a).

²⁹⁸ 47 C.F.R. § 51.321(d).

implementing rules permit Xspedius to make the choice between one-way and two-way trunks.²⁹⁹ Therefore, the Arbitrator finds for Xspedius.

Network Interconnection Architecture--transport at TELRIC rate

AT&T NIA-8(a), (b)

342. AT&T explains this issue as entailing the situation where AT&T has not deployed its own network facilities and, instead, leases facilities from SWBT for network interconnection.³⁰⁰

343. SWBT claims that it did not voluntarily negotiate this issue. Therefore, according to *Coserv* this issue is not arbitrable.³⁰¹

Determination.

344. AT&T's proposed language includes provision for transit traffic rates. The Arbitrator rejected AT&T's proposal regarding transit traffic in ¶ 322. Therefore, the Arbitrator must reject AT&T's proposed language and adopt SWBT's position.

Network Interconnection Architecture--intra-building cabling

AT&T NIA-9; CLEC Coalition NIM-9, (Xspedius) NIA-30

345. AT&T proposes language that would permit each party to cable to the other party's side of the building to interconnect when both AT&T and SWBT occupy the same building.³⁰² AT&T's recommendation is to use the "shortest practical route". Thus, AT&T does not expect SWBT to cut new holes in the floor for the cable route and is not

²⁹⁹ 47 C.F.R. 51.305(f).

³⁰⁰ AT&T Post-Hearing Brief p. 80.

³⁰¹ SWBT Post-Hearing Brief ¶ 357. The Arbitrator does not need to address this quarrel due to his determination.

³⁰² AT&T NIA DPL §§ 1.5 - 1.5.5 p. 14 - 15.

suggesting that it direct SWBT how to place the cable in its risers between floors. But, AT&T does expect SWBT to be reasonable and efficient with the placement of the cable.³⁰³ Xspedius proposed identical language.³⁰⁴

346. SWBT opposes AT&T's proposal because it would provide AT&T with discriminatory rates, terms and conditions that other CLECs may not be able to attain. Further, SWBT is concerned about safety issues that could arise if AT&T designated additional riser locations for the cable route.³⁰⁵

Determination.

347. The Arbitrator agrees with AT&T that the *Virginia Arbitration Order* rejected another ILEC's same argument that permitting AT&T intra-building interconnection was discriminatory. Further, the fact that Xspedius proposes the same language should assuage to some degree SWBT's alleged concern of discriminatory conduct. The Arbitrator further agrees that the use of "practical" in the proposed language of AT&T and Xspedius limits their opportunity for unreasonable requests. Therefore, the Arbitrator finds for AT&T and Xspedius and adopts their proposed language.

Network Interconnection Architecture--combined traffic

AT&T NIA-13; CLEC Coalition NIA-4, ITR-3

348. AT&T's proposed language includes transit traffic as part of toll traffic exchanged under the interconnection agreement between it and SWBT.³⁰⁶

³⁰³ AT&T Schell Rebuttal p. 53 line 20 - p. 54.

³⁰⁴ CLEC Coalition NIA DPL §§ 12.0 - 12.5 pp. 30 - 31.

³⁰⁵ SWBT Oyer Direct p. line 18 - p. 85 line 13.

³⁰⁶ AT&T NIA DPL § 1.1 p. 18.

349. The CLEC Coalition recognizes that AT&T has historically combined interLATA traffic with § 251(b)(5), ISP-bound and intraLATA toll traffic on the same end office trunk groups. CLECs generally do not, but want to keep open their options to do the same as AT&T if its feasible for them to do so.³⁰⁷

Determination.

350. Based upon the *Virginia Arbitration Order*, among other things, the Arbitrator found that SWBT was not obligated to accept or provide transit traffic in ¶ 322. Because AT&T has included in its proposed language transit traffic as part of intraLATA toll traffic and because intraLATA toll traffic is such an integral part of AT&T's proposed language, the Arbitrator must find for SWBT and adopt its language.

351. With respect to the CLEC Coalition's proposed language, it is indecipherable and its post-hearing brief, which is actually identical to the CLEC Coalition's position statement, does not redeem it, the Arbitrator also finds for SWBT with regard to combined traffic on trunks.

Network Interconnection Architecture--Feature Group B & D

AT&T NIA-19(a), (b), (c)

352. AT&T's proposed language will enable AT&T to provide local switching and, at its discretion, transport Feature Group B and D calls from end users who have chosen an IXC that is connected to a SWBT tandem switch. The proposed language would obligate SWBT, at AT&T's request, to transport those calls between the AT&T switch and the SWBT access tandem. Finally, AT&T proposes to use the interconnection methods in Part B Section 1 to establish Meet Point trunk groups.³⁰⁸ AT&T subsequently

³⁰⁷ CLEC Coalition Post-Hearing Brief p. 78.

changed its proposed language committing to provide local switching and transport between each AT&T switch and the applicable SWBT access tandem for Feature Group B and D calls. From the tandem, SWBT will switch and transport to the IXC POP, if requested by the IXC. AT&T may lease the transport from SWBT, consistent with the *Virginia Arbitration Order*.³⁰⁹

353. SWBT insists that meet point traffic benefits a CLEC and its customers. These trunks are specifically designed to serve CLEC customers and neither originate nor terminate on SWBT's network.³¹⁰ SWBT believes that the service described by AT&T is a switched access service and the rates, terms and conditions are contained in SWBT's access service tariff.³¹¹ SWBT did not respond to AT&T's revised language. Instead, it claims that the language already agreed to addresses tandem switching and that discussion of Feature Group B and D have no place in an interconnection agreement.³¹²

Determination.

354. AT&T is correct; the *Virginia Arbitration Order* determined that a CLEC has the right to purchase unbundled dedicated transport from the ILEC to provide IXCs with access to the CLECs' local exchange network. SWBT is incorrect. Section 2.1 of AT&T's NIA DPL has not been "already agreed to". AT&T proposes to establish Meet Point trunk groups at a SWBT tandem while SWBT insists that AT&T should be required

³⁰⁸ AT&T NIA DPL §§ 2.1, 2.11 - 13, 2.1.4 pp. 29 -32.

³⁰⁹ AT&T Schell Direct p. 108 line 6 - p. 110 line 2.

³¹⁰ SWBT Oyer Direct p. 44 line 14 - p. 45 line 7.

³¹¹ SWBT Douglas Direct p. 2 line 12 - p. 3 line 8.

³¹² SWBT Rebuttal p. 1 line 15 - p. 2 line 7.

to establish Meet Point trunk groups to *all* SWBT's tandem switches where AT&T homes its NXX codes. The Arbitrator finds for AT&T and its proposed revised language. AT&T's position is more reasonable and is more consistent with the law than is SWBT's position.

Network Interconnection Architecture--combined traffic

AT&T NIA-20(a)(b)

355. AT&T proposes language whereby it will combine 251(b)(5) traffic with intraLATA and interLATA exchange access traffic on Feature Group D exchange access trunks obtained from SWBT. AT&T suggests utilizing the Percent Local Usage (PLU) factors to determine proper billing. AT&T explains that combined traffic as described is the current arrangement under which AT&T operates in Kansas and in several other SBC states. AT&T claims that SWBT has never demonstrated a problem or brought any complaint to the Commission regarding the current arrangement that has been in place for the past six years. AT&T contends that the current arrangement is consistent with, and provided by, ¶ 251(c)(2) of the FTA. AT&T opposes SWBT's proposal that AT&T establish separate trunk groups for each type of traffic, considering this proposed requirement wasteful because AT&T has extensive Feature Group D trunking in place. AT&T claims that, contrary to SWBT's statements that the segregation of trunks is the best way to identify jurisdiction of traffic, SWBT can identify such traffic through the CPN parameters of the SS7 and the Automatic Number Identification processes.³¹³

356. SWBT does not offer any proposed language; but, in its preliminary position statement, it claims that AT&T's proposal would require extensive modifications

³¹³ AT&T Schell Direct p. 111 line 12 - p. 115 line 16; Rebuttal p. 74 line 5 - p. 77 line 2.

to both SWBT's billing systems for reciprocal compensation and its systems for billing IXC access charges.³¹⁴ SWBT complains that AT&T proposes to combine traffic on its trunks, while requiring SWBT to establish separate one-way trunks to deliver § 251(b)(5) traffic and intraLATA exchange access traffic to AT&T.³¹⁵

Determination.

357. Although the Arbitrator is curious about AT&T's reason for requiring separate trunks for traffic from SWBT to AT&T, the record supports AT&T's position. AT&T provided extensive testimony and briefing about its proposal. In contrast, SWBT offered scant direct, and no rebuttal, testimony with corresponding limited briefing on this matter. Further, SWBT's position statement about significant modification of its systems is at odds with the fact that the arrangement proposed by AT&T has been in place for the past six years. The Arbitrator adopts AT&T's proposed language.

Network Interconnection Architecture--tandems

AT&T NIA-21

358. AT&T proposes language that would require SWBT to use commercially reasonable efforts to open NPA-NXX codes for AT&T in SWBT tandems that serve exchanges not in SWBT's incumbent local exchange carrier exchange areas. AT&T explains that there are 194 instances in which other ILECs are served by SWBT's tandem switches. If SWBT does not open up the NPA-NXXs in its tandems, its customers will not be able to call AT&T customers in such exchanges. AT&T contends that, because

³¹⁴ AT&T NIA DPL § 3.4 pp. 32 -33.

³¹⁵ SWBT Oyer Direct p. 29 lines 1 - 23.

SWBT opens NPA-NXXs so that its customers can call and be called by the other ILECs' customers, refusing to do the same for AT&T would be discriminatory.³¹⁶

359. SWBT wants to address the matter in an Out of Exchange appendix rather than in the Interconnection appendix because the latter appendix is applicable only to SWBT's incumbent territory.³¹⁷ SWBT insists that § 251(c) of the FTA confines SWBT's obligations to its incumbent territory.³¹⁸

Determination.

360. SWBT's interpretation of § 251(c)(2) is too restrictive. That section requires SWBT to provide interconnection to a requesting telecommunications carrier with the local exchange carrier's network. SWBT has never stated that its tandem switches are located out of its incumbent area or that they do not assist in the provision of local exchange service. The FCC long ago found that a CLEC may interconnect with SWBT's network at SWBT tandems.³¹⁹ The Arbitrator, therefore, finds for AT&T and adopts its language. The Arbitrator should note that his determination here is not inconsistent with his determination in ¶ 12 above. The issue there was whether or not AT&T could connect to SWBT facilities that lay outside of SWBT's incumbent territory.

³¹⁶ AT&T NIA DPL § 10.0 p. 33; AT&T Schell Direct p. 115 line 17- p. 117 line 20; Rebuttal p. 77 line 3 - p. 78 line 8.

³¹⁷ AT&T NIA DPL § 10.0 p. 33.

³¹⁸ SWBT Chapman Direct p. 47 line 5 - p. 49 line 14; Rebuttal p. 8 line 3 - p. 11 line 15. N.B. SWBT's Post-Hearing Brief cites that testimony of Oyer Rebuttal pp. 27 -28 in support of its position. The Arbitrator is unable to find such testimony in Oyer's Rebuttal; furthermore, there are only 27 pages in Oyer's Rebuttal.

³¹⁹ See, ¶ 305 above.

Network Interconnection Architecture--mass calling

AT&T NIA-22(a); CLEC Coalition ITR-9; Joint Petitioners ITR-10

361. SWBT suggests language that would require all telecommunications carriers connecting with SWBT's network to establish mass calling or "choke trunks" to counter the effects that a mass-calling event (such as a radio call-in contest) could have on a SWBT end office.³²⁰

362. AT&T opposes SWBT's proposed language because it constitutes excessive engineering requirements, ignores reality and denies acceptable levels of call-blocking flexibility. This trunking requirement is applicable even if AT&T serves just a single business in a market. AT&T contends that the trunking requirement ties up terminations in both AT&T's and SWBT's switches. AT&T claims that over the past several years those trunks have sat idle with no traffic traversing over them.³²¹ Finally, AT&T proposes its own language that requires coordination between the parties to establish choke trunk groups unless considered to be unnecessary because both parties have implemented call gapping software or other measures.³²²

363. The CLEC Coalition claims that mass calling trunking requirements are a waste of resources by tying up trunk networks and telephone number NPA-NXXs. Further, the CLEC Coalition believes that the need for choke networks has diminished greatly since the advent of SS7.³²³

³²⁰ SWBT Oyer Direct p. 46 – p. 52.

³²¹ AT&T NIA DPL § 12.0 pp. 33 - 34., AT&T Schell Direct p. 118 - p. 122.

³²² AT&T NIA DPL § 12.0 pp. 33 34.

³²³ CLEC Coalition Land Direct p. 26 line 17 - p.28 line 4. Mr. Land also testified for Joint Petitioners. His testimony is identical for both parties with regard to this issue.

Determination.

364. Although SWBT places its sole reliance on its witness Mr. Oyer's rebuttal on pages 10 - 11, the testimony can be found on pages 7 - 9. However, he does not address AT&T's testimony and proposed language. The Arbitrator, therefore, finds that the record better supports AT&T's position and the Arbitrator adopts AT&T's proposed language.

365. With respect to the CLEC Coalition and Joint Petitioners, SWBT claims that the CLEC Coalition's witness is mistaken about the capability of SS7 in mass calling events. SWBT explains that multiple SS7 queries are required to set up calls using trunk circuits. These additional queries in a mass calling event could themselves cause the end office to shut down. SWBT asserts that its mass calling network requires the use of multi-frequency trunks in order to avoid this potential catastrophe, a method recommended by the North American Numbering Council.³²⁴ Mr. Oyer misses the point here. The CLEC Coalition's witness proposed the SS7 only for those few CLECs that do serve businesses that might stage an event that would incent mass calling. Those CLECs that do not have such business clients should not be forced to pay for trunking arrangements required by SWBT.³²⁵ SWBT never addressed the CLEC Coalition's proposed language. The Arbitrator finds that the record better supports the CLEC Coalition's position and proposed language than it does for SWBT.

³²⁴ SWBT Oyer Rebuttal p. 7 line 17 - p. 9 line 9.

³²⁵ CLEC Coalition Land Direct p. 27 line 8 - p. 28 line 21.

366. Because Joint Petitioners did not propose any language associated with this issue, the Arbitrator can only find that their position is better supported by the overall record than is SWBT's position.

Network Interconnection Architecture--misrouting

AT&T NIA-23; CLEC Coalition NIA-5(b); Joint Petitioners ITR-4(b);Cox ITR-3.

367. SWBT proposes language that begins with: "For purposes of this Agreement only, Switched Access Traffic shall mean. . ." SWBT contends that local interconnection trunk groups are solely for the exchange of local traffic and intraLATA traffic not presubscribed to an IXC. According to SWBT, a CLEC might occasionally improperly route interexchange traffic over a local trunk. SWBT's proposal would permit the party receiving this traffic to deliver it to the terminating party via local trunk groups. But, SWBT wants the parties to cooperatively remove or block such traffic from the local trunk groups in the future. Finally, SWBT accuses AT&T of raising internet protocol arguments which will be addressed in Phase 2.³²⁶

368. AT&T is opposed to SWBT's language that requires the calls described above to be blocked. AT&T is concerned with the impression that may be left should it be forced to block cutomers' calls. AT&T insists that occurrence of these sort of calls are *de minimus*. AT&T does agree that the parties should work cooperatively when these sort of calls do occur.³²⁷

³²⁶ SWBT Douglas Direct p. 5 line 12 - p. 7 line 10.

³²⁷ AT&T Schell Direct p. 122 - p. 126 line 12; Rebuttal p. 79 line 6 - p. 81 line 5.

Determination.

369. AT&T and SWBT agree that the occurrences of misrouted IXC calls due to the IXCs' failure to make an LNP inquiry does not happen that often. Further, AT&T and SWBT agree that they should cooperate to resolve the problem when it arises. Switched Access Traffic is the subject matter in other attachments and appendices of the interconnection agreement. The Arbitrator is wary of SWBT defining this term for the entire interconnection agreement in this isolated section of the agreement. The record better supports AT&T than it does SWBT in this matter. The Arbitrator, therefore, rejects SWBT's proposed language.

Network Interconnection Architecture--one-way trunks

Xspedius NIA-29

370. Xspedius claims that as its business continued to grow, it needed additional trunk capacity. However, SWBT would only agree to turn up two-way trunks. According to Xspedius, it now has a large inventory of two-way trunks, foisted on it by SWBT. Xspedius claims that, through this unwanted two-way trunking architecture, SWBT has forced it to bear the cost of carrying SWBT's customers' traffic. Xspedius proposes that SWBT be required to pay it \$1,794,300.94 for the cost of Xspedius' carrying SWBT-originated traffic.³²⁸ Xspedius also suggested that SWBT replace those unwanted two-way trunks with one-way trunks at SWBT's expense.³²⁹

³²⁸ Xspedius Falvey Direct p. 7 line 1 - 10.

³²⁹ *Id.* p. 15 line 20 - p. 21 line 12.

371. SWBT believes that it would be unfair for it to bear the entire financial burden of changing from two-way trunks to one-way trunk architecture.³³⁰

Determination.

372. The Arbitrator declines to rule on either proposal. Arbitration of an interconnection agreement is no place to settle, or assess, damages. Xspedius needs to avail itself of whatever other legal remedy it may possess.

Network Interconnection Architecture--CLEC switch

CLEC Coalition NIA-13

373. The CLEC Coalition proposes that its members may establish a POI at the CLEC's switch if SWBT has network facilities present at the CLEC's switch location.³³¹

374. SWBT disagrees, maintaining that interconnection must be at any technically feasible point within SWBT's network. SWBT claims that its proposed language more closely complies with § 252(c)(2) of the Act.³³²

Determination.

375. The Arbitrator finds SWBT's proposed language complies with the Act and the FCC's implementing rules better than the CLEC Coalition's proposal.

Network Interconnection Architecture

CLEC Coalition ITR-5.

376. The CLEC Coalition proposes that voice over internet protocol (VOIP) matters not be addressed, pending FCC guidance.³³³

³³⁰ SWBT Post-Hearing Brief ¶ 410.

³³¹ CLEC Coalition Post-Hearing Brief pp. 70 - 71. The brief did not cite to any CLEC Coalition witness' testimony.

³³² SWBT Post-Hearing Brief ¶¶ 326, 329. The brief did not cite to any SWBT witness' testimony.

377. SWBT does not appear to have briefed the issue.

Determination.

378. The Arbitrator finds that the record evidence supports the CLEC Coalition's proposal more than it does SWBT's proposal, if there is one. The Arbitrator's determination is limited to the VOIP deferral issue.

Network Interconnection Architecture—leased facilities

CLEC Coalition NIA-15, ITR-1, NIM-1

379. The CLEC Coalition proposes language that would (1) require SWBT to reimburse a member for its use of any and all facilities carrying SWBT traffic between the collocation space and the POI (NIA-15)³³⁴; (2) require SWBT to allow CLEC Coalition member to use the same facilities (e.g. transport access facilities, dedicated transport UNE facilities) to provide one-way or two-way trunks (ITR-1)³³⁵; and, (3) allow network interconnection by leasing SWBT facilities (NIM-1)³³⁶. The CLEC Coalition claims that § 251(c)(2) requires SWBT to lease facilities for interconnection at TELRIC rates.³³⁷

380. SWBT maintains that it did not voluntarily negotiate issues regarding leasing facilities. SWBT, therefore, invokes the sanctuary of *Coserv* which stands for the

³³³ CLEC Coalition Post-Hearing Brief pp. 71 -73. The brief cites Land Direct at p. 14 for support of the CLEC Coalition's position. Mr. Land discusses transit services there, not VOIP.

³³⁴ CLEC Coalition NIA DPL § 2.6 p. 17.

³³⁵ CLEC Coalition ITR DPL § 1.4 p. 1.

³³⁶ CLEC Coalition NIM DPL introduction p. 1.

³³⁷ CLEC Coalition Land Direct p. 25 lines 4 - 6.

proposition that for an issue to be an open one both parties must voluntarily consent to negotiation of such items.³³⁸

Determination.

381. SWBT provided notice at the outset of these proceedings that leasing facilities were not arbitrable³³⁹. The CLEC Coalition never countered SWBT's position. The Arbitrator, therefore, finds that CLEC Coalition NIA -15, ITR-1 and NIM-1 are not open issues and, thus, are not subject to arbitration.

Network Interconnection Architecture--signaling interconnection

Xspedius NIA-17

382. Xspedius proposes language that addresses the processes that would apply if it and SWBT agree to utilize SS7 trunking.³⁴⁰ Xspedius suggests that SWBT should pay for its proportional use if it uses SS7 trunking provided by Xspedius or connects to Xspedius SS7 ports.³⁴¹

383. SWBT explained that the FCC has declared that CLECs are no longer dependent upon the incumbent's SS7 signaling system because there are 3rd parties providing the service in the marketplace now. This means that in any arrangement for SS7 functionality with a third party, that provider should establish separate commercial agreements for connection with SWBT and Xspedius.³⁴²

³³⁸ SWBT Post-Hearing Brief ¶ 357.

³³⁹ CLEC Coalition NIA DPL § 2.6 Preliminary Position p. 17; CLEC Coalition ITR DPL § 1.4 Preliminary Position p. 1; CLEC Coalition NIM DPL Preliminary Position introduction. p. 1

³⁴⁰ CLEC Coalition Post-Hearing Brief pp. 79 -80.

³⁴¹ Xspedius Moore Tr. Vol. 3 p. 802 line 16 - p. 803 line 6.

³⁴² SWBT Novack Direct p. 3 lines 4 – 14.

Determination.

384. SWBT misses the point in this issue. Xspedius maintains its own SS7 signaling system. If SWBT uses it, Xspedius understandably wants SWBT to pay for the use of it. The Arbitrator finds that the record evidence better supports Xspedius' position than it does SWBT's. The Arbitrator, therefore, adopts Xspedius' language.

Interconnection Trunking Requirements--trunk orders

CLEC Coalition ITR-6

385. SWBT proposes that trunk groups be ordered by CLEC Coalition via Access Service Request (ASR)³⁴³ as this has been the customary process by which interconnection trunks have been ordered.³⁴⁴ SWBT notes that the CLEC Coalition does not indicate any reason for departing from the normal processes and does not propose any acceptable process to replace ASR.³⁴⁵

386. The CLEC Coalition's concern is that agreeing to the ASR may allow SWBT to prejudge the type of facilities requested by the CLEC.³⁴⁶

Determination.

387. The Arbitrator finds for SWBT on this limited ASR issue. The CLEC Coalition criticized the use of the ASR but did not offer an alternative. Further, it did not provide testimony on the matter. The record supports SWBT's position more than it does the CLEC Coalition's.

³⁴³ CLEC Coalition ITR DPL § 2.1.2 p. 15.

³⁴⁴ SWBT Christensen Supplemental Direct p. 3 lines 3 - 6.

³⁴⁵ SWBT Post-Hearing Brief ¶¶ 445 - 446.

³⁴⁶ CLEC Coalition Post-Hearing Brief pp. 74 - 75.

Interconnection Trunking Requirements--trunk forecasts

CLEC Coalition ITR-11

388. The CLEC Coalition proposes language that includes measurements that reflect actual tandem local interconnection and interLATA trunks, end office local interconnection trunks and tandem subtending end office trunk requirements.³⁴⁷

389. SWBT proposes that the yearly forecasted trunk quantities be for all the trunk groups referenced in the agreement. SWBT explained that CLECs are requested to estimate the number of Trunks they expect to have in service in each trunk group during each of the next two years.³⁴⁸

Determination.

390. The Arbitrator finds for SWBT. Its proposed language is much more direct and encompassing than that of the CLEC Coalition. The Arbitrator adopts SWBT's proposed language.

Network Interconnection Methods

CLEC Coalition NIM-7

391. The CLEC Coalition proposes to use the description of virtual collocation that is contained in SWBT's tariff. The CLEC Coalition wants to keep the current K2A language even though SWBT objects to the tariff reference. As it is, the Collocation Appendix refers to SWBT's Virtual Collocation tariff.³⁴⁹

³⁴⁷ CLEC Coalition ITR DPL § 4.3.1 p. 20; CLEC Coalition Post-Hearing Brief p. 81.

³⁴⁸ CLEC Coalition ITR DPL § 4.3.1; SWBT Oyer Direct p. 58 line 3 - p. 59 line 10.

³⁴⁹ CLEC Coalition Post-Hearing Brief pp. 81 - 82.

392. It is SWBT's position that CLECs should not be able to pick and choose rates, terms and conditions from both its interconnection agreement with SBC and a state tariff.³⁵⁰

Determination.

393. The Arbitrator finds that using a tariff-defined term, as the CLEC Coalition suggest, does not provide it with the authority to pick and choose as described by SWBT. The Arbitrator finds for the CLEC Coalition and adopts its proposed language.

Network Interconnection Methods-- 3rd party leasing

CLEC Coalition NIM-8

394. Xspedius has proposed language regarding the parties' options to interconnect with each other. If SWBT utilizes facilities provided by a source other than itself or Xspedius, SWBT will comply with industry standards to maintain network integrity and pay the fees assessed by the third party.³⁵¹

Determination.

395. SWBT failed to brief this issue. Therefore, the Arbitrator must find that the record evidence better favors the CLEC Coalition's position than that of SWBT. The Arbitrator, adopts the CLEC Coalition's proposed language.

³⁵⁰ SWBT Post-Hearing Brief ¶ 467.

³⁵¹ CLEC Coalition NIM DPL § 9.3 pp. 11 -12; CLEC Coalition Post-Hearing Brief p. 82.

Interconnection Trunking Requirements--service-affecting

CLEC Coalition ITR-15

396. The CLEC Coalition proposes that SWBT be required to place "Service Affecting" on the trunk group service request (TGSR) in a blocking situation when additional capacity is required.³⁵²

397. SWBT counters that the CLEC will know if the TGSR is service affecting if the request is to augment or add trunks.³⁵³

Determination.

398. The CLEC Coalition did not cite to any of its witnesses' testimony and did not explain how it expects its proposed language to reduce the possibility of customer service-affecting problems. The Arbitrator finds that the CLEC Coalition did not carry its burden of proof for its proposed language and rejects same.

Interconnection Trunking Requirements--expedited orders

CLEC Coalition ITR-18

399. The CLEC Coalition offers its last, best offer for this issue with revised language: "In a blocking situation or upon reasonable demonstration that blocking is likely if the order is not expedited every effort will be made to accommodate the request."³⁵⁴

³⁵² CLEC Coalition ITR DPL § 5.5.1 p. 24.

³⁵³ SWBT Post-Hearing Brief ¶ 461.

³⁵⁴ CLEC Coalition Post-Hearing Brief pp. 76 -77.

400. SWBT's preliminary position notes that SWBT agrees that there may be a need to expedite orders to avoid potential blocking situations.³⁵⁵

Determination.

401. The Arbitrator finds that the CLEC Coalition's last and best offer of proposed language is consistent with SWBT's position. Consequently, the Arbitrator finds for the CLEC Coalition and adopts its best and final proposed language.

Network Interconnection Methods--mid-span

CLEC Coalition NIM-2, 3

402. The CLEC Coalition insists that mid-span fiber meet point is a technically feasible point of interconnection where the CLEC's fiber cable and SWBT's fiber cable are connected at an economically and technically feasible point.³⁵⁶

403. SWBT claims that CLEC Coalition members must connect with SWBT's network at a technically feasible point of interconnection.³⁵⁷ SWBT never claimed that its fiber run does not contain any technically feasible point for interconnection.

Determination.

404. The CLEC Coalition and SWBT actually seem to be in agreement with respect to the capability of a CLEC to interconnect with SWBT at a technically feasible point of interconnection on SWBT's network. The Arbitrator finds that mid span fiber meet points are technically feasible points of interconnection on SWBT's network. Consequently, the Arbitrator finds for the CLEC Coalition and adopts its language.

³⁵⁵ CLEC Coalition ITR DPL § 6.23 SWBT Preliminary Position p. 21.

³⁵⁶ CLEC Coalition Post-Hearing Brief p. 77; CLEC Coalition NIM DPL § 1.0 - 1.4 pp. 3 - 7.

³⁵⁷ SWBT Post-Hearing Brief ¶¶ 325 - 331.

Interconnection Trunking Requirements--combining special access transport

CLEC Coalition ITR-1

Determination.

405. At the CLEC Coalition's behest, the Arbitrator determined the Coalition's ITR-1 issue in ¶ 381 above. The Arbitrator declines to rule twice on the same issue.

Interconnection Trunking Requirement--definitions

CLEC Coalition NIA 6, 7, 9, ITR-4, 6 (b)

406. The CLEC Coalition proposes language that would define several terms such as "transit traffic".³⁵⁸

407. SWBT is opposed to the language because (1) "transit traffic" is not an open issue; even if it is, § 251(b)(2) traffic does not include transit traffic³⁵⁹; (2) it is not appropriate to include out of exchange traffic in the NIA appendix because the NIA appendix is only applicable to SWBT's incumbent territory³⁶⁰; (3) optional EAS does not exist in Kansas³⁶¹; (4) ITR-4 is not an open issue³⁶²; and, (5) local only tandem switches are not designed to handle access traffic³⁶³.

³⁵⁸ CLEC Coalition NIA DPL § 1.16

³⁵⁹ *Id.*

³⁶⁰ *Id.* p. 7.

³⁶¹ *Id.* p. 8; SWBT Chapman Direct p. 57 lines 1 - 5.

³⁶² CLEC Coalition ITR DPL § 2.1.1 SWBT Preliminary Position p. 10.

³⁶³ *Id.* § 2.1.2 pp. 15 - 16.

Determination.

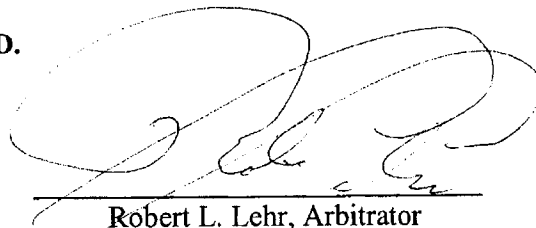
408. The Arbitrator finds that the record evidence supports SWBT's position better than it does the CLEC Coalition's. The CLEC Coalition did not express any opposition to SWBT's claim that "transit traffic" was not an open issue. With no witness reference in its brief, the CLEC Coalition also apparently did not respond to SWBT's claim that optional EAS did not exist in Kansas. The Arbitrator rejects the CLEC Coalition's proposed language.

409. The Arbitrator observes that it has been difficult to ensure that each issue raised by each party has been addressed. One party would often raise the same or a similar issue as another party, but there might be slight differences that a party wanted to have addressed. The Arbitrator hopes that even if a particular issue has not been specifically addressed, the parties will review the issues that are set out in this order to ascertain whether decisions that have been made fit a particular situation and attempt to reach resolution. If, an issue has been completely overlooked, this is inadvertent. If this is the case, the Arbitrator requests the parties bring any overlooked issues to his attention, so that he may attempt to decide them. Comments on the Arbitrator's decision are not due until April 15, 2005. The Arbitrator requests the parties bring any issues that may have been overlooked to his attention by March 4, 2005.

410. On December 23, 2004, the Arbitrator issued an Order in these dockets requiring the parties to file reports on issues affected by the FCC's Triennial Review Order by January 10, 2005. The Order was then expected to be released by January 5, 2005. It was, in fact, not released until February 4, 2005. To the extent any decisions made by the Arbitrator in this Order, are affected by the FCC's Triennial Review Order,

the Arbitrator requires the parties to file a report, explaining which issues are affected by the Triennial Review Order and how they are affected by March 4, 2005. Any party wishing to respond to any such reports, may do so by March 14, 2005.

BY THE ARBITRATOR, IT IS SO ORDERED.



Robert L. Lehr, Arbitrator

FEB 16 2005

ORDER MAILED

FEB 17 2005



Susan L. Hoff Executive
Director

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

PETITION OF CLEC COALITION §
FOR ARBITRATION AGAINST §
SOUTHWESTERN BELL TELEPHONE, L.P. § Cause No. PUD 200400497
D/B/A SBC OKLAHOMA UNDER §
SECTION 252(b)(1) OF THE §
TELECOMMUNICATIONS ACT OF 1996 §

REQUEST OF THE CLEC JOINT PETITIONERS §
FOR ARBITRATION WITH SOUTHWESTERN §
BELL TELEPHONE, L.P. D/B/A SBC § Cause No. PUD 200400496
OKLAHOMA FOR AN INTERCONNECTION § (consolidated with
AGREEMENT THAT COMPLIES WITH § PUD 200400497)
SECTION 251 AND 271 OF THE FEDERAL §
TELECOMMUNICATIONS ACT §

HEARING: March 29-April 1, 2005
Before Maribeth D. Snapp, Arbitrator

APPEARANCES: J. David Jacobson, Attorney
EasyTel Communications Carrier Corporation
UT Phone, Inc.
Kendall Parrish, Attorney
Bixby Telephone Sales & Service, Inc.
Central Cellular, Inc.
Chickasaw Telecommunications Services, Inc.
WilNet Communications, LLC
Michelle Bourianoff and Marc Edwards, Attorneys
AT&T Communications of the Southwest, Inc.
TC Systems, Inc.
George Makohin, Attorney
Fulltel, Inc.
Bill Magness and Nancy Thompson, Attorneys
Birch Telecom of Oklahoma, Inc.
ionex communications, Inc.
Cox Oklahoma Telcom, L.L.C.
NuVox Communications, Inc.
nii communications, Ltd.
Xspedius Management Co. Switched Services, LLC, d/b/a
Xspedius Communications, LLC, and Xspedius Management
Co. of Tulsa, LLC, d/b/a Xspedius Communications, LLC
Western Communications, Inc. dba Logix Communications
(collectively the "CLEC Coalition")

FILED
APR 12 2005

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CORPORATION COMMISSION
OF OKLAHOMA

Marc Edwards, Attorney
Navigator Telecommunications, LLC
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Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma
Lenora F. Burdine and Bennett Abbott, Assistant General Counsels
Public Utility Division, Oklahoma Corporation Commission

WRITTEN REPORT OF THE ARBITRATOR

There comes on for consideration and action the determination of the terms for Interconnection Agreements between Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma ("SBC") and each of the following CLECs: EasyTel Communications Carrier (PUD 200400477); Bixby Telephone Sales & Service, Inc., Central Cellular, Inc., Chickasaw Telecommunications Service, Inc., Wilnet Communications, LLC (PUD 200400492); AT&T Communications of the Southwest, Inc. ("AT&T") and TC Systems, Inc. (PUD 200400493); FullTel, Inc. (PUD 200400495); Birch Telecom of Oklahoma, Inc., ionex communications, Inc., Cox Oklahoma Telcom, L.L.C., NuVox Communications, Inc., nii communications, Ltd., Xspedius Management Co. Switched Services, LLC, d/b/a Xspedius Communications, LLC, and Xspedius Management Co. of Tulsa, LLC, d/b/a Xspedius Communications, LLC, Western Communications, Inc. dba Logix Communications (referred to collectively as the "CLEC Coalition") (PUD 200400497, consolidated with PUD 200400496); and Navigator Telecommunications, LLC (PUD 200400499). Because many of the issues in each of these cases are the same, and for purposes of judicial economy, the entire record of the hearing on the merits will be used for each of these cases.

PROCEDURAL HISTORY

These causes resolve arbitrated issues relating to successor agreements to the Oklahoma 271 Agreement ("O2A"), which was adopted by this Commission in PUD 970000560, Order No. 445180. As this Commission described the O2A in Order No. 445180, the O2A is a "proposed, comprehensive contract relating to all aspects of Southwestern Bell's wholesale operations in Oklahoma."¹ In Order No. 445180, this Commission further stated that "[t]o ensure that competitive local exchange carriers ("CLECs") have easy access to a contract incorporating Southwestern Bell's various section 271 commitments, Southwestern Bell has proposed a model interconnection agreement, known as the Oklahoma 271 Agreement ("O2A")."²

The importance to CLECs of the O2A and the successor agreements which are the subject of these arbitrations is evidenced by the number of parties in these causes. A substantial number of CLECs actively offering service in Oklahoma are active parties in these arbitration proceedings. Additionally, an even greater number of CLECs are parties to O2A agreements

¹ Order Regarding Recommendation on 271 Application Pursuant to Telecommunications Act of 1996, Order No. 445180, Cause No. 970000560 (September 28, 2000), at p. 150.

² Id.

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

PETITION OF **CLEC COALITION** FOR)
ARBITRATION AGAINST)
SOUTHWESTERN BELL TELEPHONE,)
L.P., d/b/a SBC OKLAHOMA UNDER)
SECTION 252(b)(1) OF THE)
TELECOMMUNICATIONS ACT OF 1996)

CAUSE NO. PUD 200400497

**JOINT DECISION POINT LISTS (DPLS) OF SBC OKLAHOMA
AND CLEC COALITION**

(VOLUME 1 OF 5)

AND

ARBITRATOR'S RECOMMENDATION

DOCKET # 2004-497
MASTER LIST OF ISSUES BETWEEN SBC AND CLEC COALITION
GT&C

Issue Statement	Issue No.	Attachment and Section(s)	CLEC Language	CLEC Preliminary Position	SBC OKLAHOMA Language	SBC OKLAHOMA Preliminary Position	Arbitrator's Recommendation
<p>Does the Commission have the jurisdiction to arbitrate language which pertains to Section 271 and 272 of the Act and which was not voluntarily negotiated and does not address 251(b) or (c) obligation?</p> <p>Coalition Statement of the Issue: Should the O2A successor interconnection agreements continue to reflect the commitments SBC made to the Commission and CLECs in order to obtain Section 271 relief?</p>	1	WHEREAS		<p>CLEC Coalition position on remaining issues:</p> <p>SBC made commitments to the OCC and Oklahoma CLECs in order to obtain the OCC's support for its 271 application. Those commitments were embodied in the O2A and should not be eliminated unless SBC is willing to give up its 271 relief. The CLEC Coalition's language accurately reflects the representations and actions where SBC agreed to treat CLECs as valued wholesale customers, in response to concerns that SBC was not currently doing so. These commitments were an integral part of the Commission's conclusion that the Oklahoma market was irreversibly open to competition. The Coalition does not seek to have the parties' interconnection agreement continue in</p>	<p>WHEREAS, pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the Act), the Parties wish to establish terms for the resale of SBC OKLAHOMA services and for the provision by SBC OKLAHOMA of Interconnection, Unbundled Network Elements, and Ancillary Functions as designated in the Attachments hereto.</p> <p>WHEREAS, the Parties want to Interconnect their networks pursuant to Attachment 11 and associated appendices to provide, directly or indirectly, Telephone Exchange Services and Exchange Access to residential and business End Users over their respective Telephone Exchange Service facilities which are subject to this Agreement; and</p> <p>WHEREAS, the Parties are entering into this Agreement to set forth the</p>	<p>The CLEC Coalition proposes language which purports to set forth SBC OKLAHOMA's obligations pursuant to Section 271 and 272 of the Telecommunications Act. Pursuant to the Fifth Circuit's recent opinion in <i>Coserve v. Southwestern Bell Tel. Co.</i>, 350 F. 3d 482 (5th Cir. 2003), this language is mandatory arbitration because it does not relate to SBC OKLAHOMA's 251(b) or (c) obligations and SBC OKLAHOMA did not voluntarily consent to negotiate the language.</p> <p>SBC OKLAHOMA opposes the CLEC Coalition's proposed language stating that this agreement sets forth SBC OKLAHOMA's obligations pursuant to Section 271 of the ACT. This is an untrue</p>	<p>The Interconnection agreement should contain reference to § 251 terms and conditions as well as reference to the elements required to be provided to the CLEC in order to complete interconnection. Although it is clear that only mandated UNEs must be provided to CLECs by SBC, the Arbitrator finds that this affects the price for certain elements as opposed to the availability for purchase of some of the elements. The CLEC's language is adopted, after changing "Texas" to "Oklahoma."</p>

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DOCKET # 2004-497
MASTER LIST OF ISSUES BETWEEN SBC AND CLEC COALITION
GT&C

Issue Statement	Issue No.	Attachment and Section(s)	CLEC Language	CLEC Preliminary Position	SBC OKLAHOMA Language	SBC OKLAHOMA Preliminary Position	Arbitrator's Recommendation
			<p>perpetuity; it simply wants to hold SBC to the specific 271-based promises it made that are still relevant to today's market. SBC's refusal to agree to this language causes great concern to the CLECs about a change in SBC's willingness to treat CLECs as valued customers for wholesale services.</p> <p>Although many aspects of the interconnection agreement concern § 251 rights and obligations, the current interconnection agreements between SBC and CLECs contain provisions that have no express basis in § 251. The Parties have historically used their interconnection agreement to address all aspects of their business relationship, including many topics that were not strictly required by § 251. For example, § 251 does not explicitly require that the parties' rights regarding</p>	<p>respective obligations of the Parties and the terms and conditions under which the Parties will Interconnect their networks and facilities and provide to each other services as required by the Telecommunications Act of 1996 as specifically set forth herein; and</p> <p>WHEREAS, for purposes of this Agreement, CLEC intends to operate where Southwestern Bell Telephone, L.P. d/b/a SBC OKLAHOMA is the incumbent Local Exchange Carrier and CLEC, a competitive Local Exchange Carrier, has or, prior to the provisioning of any Interconnection, access to Unbundled Network Elements, Resale Services or any other functions, facilities, products or services hereunder, will have been granted authority to provide certain local Telephone Exchange Services in the SBC OKLAHOMA's areas by</p>	<p>statement. An examination of the ICA reveals that there are no rates, terms and conditions related to SBC OKLAHOMA's 271 obligations. These negotiations and this arbitration addresses only Sections 251 and 252 obligations. It is inappropriate to state that the ICA includes 271 obligations when it should not and does not.</p> <p>Language relating to SBC OKLAHOMA's 271 obligations does not belong in a Section 251 interconnection agreement</p> <p>Quate Direct pp. 2-3</p> <p>Silver Rebuttal pp. 4-8 Quate Rebuttal pp. 1-2</p>		

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Issue Statement	Issue No.	Attachment and Section(s)	CLEC Language	CLEC Preliminary Position	SBC OKLAHOMA Language	SBC OKLAHOMA Preliminary Position	Arbitrator's Recommendation
			the liabilities, warranties, insurance, dispute resolution, billing, etc., be included in their interconnection agreement, but for eight years now, both the ILECs and CLECs have recognized that an interconnection agreement should address all aspects of their business relationship. Any provisions that govern the parties' relationship should be subject to arbitration by the OCC.	the liabilities, warranties, insurance, dispute resolution, billing, etc., be included in their interconnection agreement, but for eight years now, both the ILECs and CLECs have recognized that an interconnection agreement should address all aspects of their business relationship. Any provisions that govern the parties' relationship should be subject to arbitration by the OCC.	Oklahoma Corporation Commission ("OCC" or "Commission"); and WHEREAS, CLEC wishes to enter an agreement containing those terms and conditions.		
			The 271 and 272 references are important because they reflect promises and provide critical checks and balances that create an incentive for SBC to treat CLECs as business partners, rather than as unwanted competitors. For example, SBC agreed to undertake a number of tasks to improve the way it treats CLECs. SBC agreed, for example, to provide post interconnection agreements,	The 271 and 272 references are important because they reflect promises and provide critical checks and balances that create an incentive for SBC to treat CLECs as business partners, rather than as unwanted competitors. For example, SBC agreed to undertake a number of tasks to improve the way it treats CLECs. SBC agreed, for example, to provide post interconnection agreements,			

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Issue Statement	Issue No.	Attachment and Section(s)	CLEC Language	CLEC Preliminary Position	SBC OKLAHOMA Language	SBC OKLAHOMA Preliminary Position	Arbitrator's Recommendation
			<u>SBC failed to provide accessible letters, technical publications, etc. on its wholesale website. SBC also agreed to provide Enhanced Extended Links and Transit Service to CLECs and to include performance measures and a performance remedy plan in the O2A. All these and other actions by SBC contributed to the Commission finding that the local market in Oklahoma was "irreversibly" open to competition. Now SBC is trying to close the door simply because the O2A, the document that embodied its commitments, is expiring. The CLEC Coalition understood that the O2A would expire and that the rates contained therein were not permanent. But many of the voluntary commitments SBC made to the Commission and CLECs during the 271 proceeding were intended to be permanent. Just</u>	accessible letters, technical publications, etc. on its wholesale website. SBC also agreed to provide Enhanced Extended Links and Transit Service to CLECs and to include performance measures and a performance remedy plan in the O2A. All these and other actions by SBC contributed to the Commission finding that the local market in Oklahoma was "irreversibly" open to competition. Now SBC is trying to close the door simply because the O2A, the document that embodied its commitments, is expiring. The CLEC Coalition understood that the O2A would expire and that the rates contained therein were not permanent. But many of the voluntary commitments SBC made to the Commission and CLECs during the 271 proceeding were intended to be permanent. Just			

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				<p>because they were embodied in the O2A does not change this fact.</p> <p>SBC offers a complicated alternative to having a single, integrated agreement that embodies all of the Parties obligations to each other: SBC apparently believes the Parties should have multiple agreements governing their relationships that will somehow seamlessly mesh with no problems of determining which of the many agreements applies in any given circumstance. SBC's buzzword embodying this concept is "commercial" negotiations and agreements to address all aspects of their interaction with CLECs that are not expressly listed in FTA § 251. Apparently, SBC's goal in such a bifurcation is to remove the Commission's authority to address post-interconnection disputes,</p>			

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				<p>and to shift jurisdiction to the courts. And as for any disputes about SBC's failure to maintain its Section 271 obligations, SBC would much prefer those issues be addressed solely by the FCC.</p> <p>Such an approach is not compelled by the FCC in its orders or rules. Indeed, the FCC's order approving SBC's Oklahoma 271 application clearly relies upon the promises SBC made to both the Oklahoma Commission and CLECs. The FCC stated that that "cooperative state and federal oversight and enforcement" would address any backsliding that might arise with respect to SWBT's entry into the Oklahoma long distance market. When CLECs sought protections from the FCC against possible "backsliding" by SBC of its 271 commitments, SBC argued to the FCC that</p>			

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				<p>additional assurances were unnecessary because the liquidated damages and performance measures remedies in the 2A agreements would protect CLECs from any failure by SBC to meet its commitments. More importantly, SBC told the FCC that:</p> <p>"Before interLATA relief is granted, the Commission is directed to consult with the relevant state commissions to verify compliance under § 271(c). Thus, before § 271 relief is granted, the state commission will have been able to determine compliance, as well. There is no reason to believe that, absent national guidelines, <i>state commissions will be any less competent to assess compliance with § 271(c) after interLATA relief is granted than before.</i>"</p> <p>Now, in direct contrast to its prior representations, SBC seeks to deny the OCC the authority to resolve</p>			

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				disputes regarding SBC's 271 compliance. The Coalition believes that local competition will only be sustainable if SBC, the incumbent and still dominant carrier, is required to conform to the characteristics of a "willing wholesaler." Until SBC finds it in its own best interests to willingly undertake interconnection obligations that facilitate a positive relationship with a CLEC, regulators will have to ensure that it does. Krabill/Cadieux/ Falvey/Ivanuska Direct pp. 10-17 Krabill/Cadieux/ Falvey/Ivanuska Rebuttal pp. 6-8			
Should the Interconnection Agreement obligate SBC to provide UNEs, collocation and resale services outside SBC	2	GT&C 1.1-1.3 and 1.6, 1.7, 1.8	1.1 This Agreement sets forth the terms, conditions and prices under which SBC OKLAHOMA agrees to provide (a) services for resale (hereinafter referred to as Resale services), (b) unbundled Network	Issue 2(a) , Network Elements: This issue is being addressed as part of the UNE 6 attachment.		By its proposed language, CLEC Coalition seeks to require SBC OKLAHOMA to offer UNEs, collocation, resale and interconnection	SBC is only required to provide interconnection, UNEs, collocation, or resale in those areas where it is the ILEC.

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<p>OKLAHOMA's incumbent local exchange area?</p> <p>Coalition Statement of the Issues:</p> <p>(a) [Whereas clause and § 1.1 & 1.2] Should the reference to "network element" be maintained in the ICA, as distinguished from "unbundled network elements"?</p> <p>(b) [§ 1.3] Should SBC provide assurance of the continuation of Network Elements, Combinations, and Ancillary Functions during the term of the Agreement?</p> <p>(c) [§ 1.6] See SBC's statement above</p> <p>(d) [§ 1.7 & 1.8] Should CLECs be required to agree with</p>			<p>Elements, or combinations of such <u>unbundled</u> CLEC's network to SBC OKLAHOMA's network and Inter-carrier Compensation for inter-carrier telecommunications traffic exchanged between CLEC and SBC OKLAHOMA.</p> <p>1.2 <u>The unbundled Network Elements, Combinations or Resale services provided pursuant to this Agreement may be connected to other Network Elements, Combinations or Resale services provided by SBC OKLAHOMA or to any network components provided by CLEC itself or by any other vendor. Subject to the requirements of this Agreement, CLEC may at any time add, delete, relocate or modify the Resale services, Network Elements or Combinations purchased hereunder.</u> Subject to the provisions of Attachment 6: Unbundled Network Elements (UNE) and upon CLEC request, SBC OKLAHOMA shall meet its UNE combining obligations as and to the extent required by FCC rules and orders, and <u>Verizon Comm. Inc. v. FCC</u>, 535 U.S. 467 (May 13, 2002) ("Verizon Comm. Inc.") and, to the extent not inconsistent therewith, the rules and orders of the relevant state Commission and any other Applicable</p>	<p>Issue 2(b): The language supported by the CLEC Coalition is currently in the O2A and provides assurances that are necessary to protect continuity of service to the customer. SBC didn't mind giving CLECs such assurances when it wanted to enter the long distance market but, having accomplished this goal, SBC apparently wishes to drop this quid pro quo. The CLECs' provision does not override other sections of the Agreement, including the Change of Law provision. The Commission previously found this language to be reasonable and it should do so again.</p> <p>The proposed CLEC Coalition language is designed to memorialize SBC's obligation to continue the provision of network elements and ancillary functions, in</p>		<p>outside of its Incumbent Local Exchange Area. SBC OKLAHOMA'S 251(c) obligations are only applicable when SBC OKLAHOMA is the incumbent local exchange carrier, i.e. in SBC OKLAHOMA'S incumbent territory. In order to avoid the obvious legal restriction on CLEC Coalition's proposed language, CLEC has added language to its proposal seeking to incorporate SBC OKLAHOMA'S 271 obligations into the interconnection Agreement via this arbitration.</p> <p>To the extent that SBC OKLAHOMA provides non-competitive services that extend beyond its Incumbent areas, (such as OS/DA, E911) it will provide such services and functions to CLECs in accordance with he</p>	

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Issue Statement	Issue No.	Attachment and Section(s)	CLEC Language	CLEC Preliminary Position	SBC OKLAHOMA Language	SBC OKLAHOMA Preliminary Position	Arbitrator's Recommendation
SBC's legal theories about the limitations of its unbundling obligations under the Act?			<p>Law.</p> <p>1.3 <u>Except as provided in this Agreement, during the term of this Agreement, SBC OKLAHOMA will not discontinue, as to CLEC, any Network Element, Combination, or Ancillary Functions offered to CLEC hereunder. During the term of this Agreement, SBC OKLAHOMA will not discontinue any Resale services or features offered to CLEC hereunder except as provided in this Agreement. This Section is not intended to impair SBC OKLAHOMA's ability to make changes in its Network, so long as such changes are consistent with the Act and do not result in the discontinuance of the offerings of Network Elements, Combinations, or Ancillary Functions made by SBC OKLAHOMA to CLEC as set forth in and during the terms of this Agreement.</u> In the event that SBC OKLAHOMA denies a request to perform the functions necessary to combine UNEs or to perform the functions necessary to combine UNEs with elements possessed by CLEC, SBC OKLAHOMA shall provide written notice to CLEC of such denial</p>	<p>addition to combinations, in accordance with the balance of the Agreement. In this way, CLECs hope to prevent SBC's unilateral discontinuance of some product or service, thereby jeopardizing the CLEC's relationship with its customer. If some subsequent change in the law warrants the discontinuance of a service, SBC can effect such a discontinuation through the change of law provision of the Agreement.</p> <p>The Coalition's language does not override the provisions of UNE 6, but simply pointing to that Attachment does not provide the assurances the Coalition seeks. The CLEC Coalition's proposed language is in the current O2A, is consistent with the balance of the Agreement and with applicable law, and should not be a problem for SBC if it has a</p>		<p>appropriate tariffed rates, terms and conditions. However, SBC OKLAHOMA'S incumbent obligations under Section 251(c) do not extend beyond its incumbent territory.</p> <p>SBC OKLAHOMA'S proposed language in Section 1.7 sets forth the sections of the Act which obligate SBC OKLAHOMA to provide UNEs, collocation, interconnection and resale and states that SBC OKLAHOMA has no obligation to provide UNEs, collocation, resale or interconnection outside of its incumbent local exchange areas. As set forth above, SBC OKLAHOMA'S 251 (c) obligations are only applicable when SBC OKLAHOMA is the incumbent local exchange carrier, i.e. in SBC OKLAHOMA'S</p>	

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			<p>and the basis thereof <u>in accordance with the procedures set forth in Attachment 6.</u> Any dispute over such denial shall be addressed using the dispute resolution procedures applicable to this Agreement. In any dispute resolution proceeding, SBC OKLAHOMA shall have the burden to prove that such denial meets one or more applicable standards for denial, including without limitation those under the FCC rules and orders, Verizon Comm. Inc. and the Agreement, including Section 2.12 of Attachment 6: Unbundled Network Elements.</p> <p><u>1.6 Unless otherwise provided in the Agreement, SBC OKLAHOMA will perform all of its obligations under this agreement throughout the entire operating area(s) in which SBC OKLAHOMA is then deemed to be the ILEC; provided, that SBC OKLAHOMA's obligations to provide Ancillary Functions or to meet other requirements of the Act covered by this Agreement are not necessarily limited to such service areas.</u></p>	<p>good faith intent to comply with the terms of the Agreement that obligate it to provide these services to CLECs.</p> <p>Issue 2(c): SBC attempts to limit the services it provides to carriers by creating an artificial boundary of its incumbent local exchange area. If SBC has established its facilities in another ILEC's local exchange area for the purpose of interconnecting with that ILEC, these facilities could be used by a CLEC to interconnect with SBC in order to more efficiently serve a CLEC customer in that area. If SBC has existing facilities with unused capacity, such interconnections could occur outside of the SBC local exchange area. FTA § 251(c)(2) does not limit interconnection to the ILEC service territory.;</p>	<p>Incumbent Territory. Silver Direct pp. 43-45</p> <p>McPhee Direct pp. 80-82</p> <p>Silver Rebuttal pp. 22-23</p>		

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				<p>instead, it refers only to a "carrier's network" without any limiting language.</p> <p>Issue 2(d): SBC is adamant that its obligations originate only under certain subparts of FTA Section 251, and has even proposed new contract Section 1.7 and 1.8, wherein CLECs must "agree" with SBC's position. However, there are many rights and obligations that are being addressed in this Agreement that are derived from Section 271, from state law, or simply from the Parties' implicit acknowledgment that the Agreement should address all the issues that arise as a result of the Parties dealing with each other (such as warranties, insurance, dispute resolution, etc.) Section 271 obligations, in particular, are appropriately contained in a Section 252 agreement with an RBOC</p>			

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				<p>such as SBC.</p> <p>Despite all of this, SBC still persists in demanding that the CLECs affirmatively <i>agree</i> that SBC's obligations originate under Section 251 only – and not under Section 271. Such a demand is unreasonable, and SBC's proposed language has no place in the interconnection agreement. The CLEC Coalition requests these sections be stricken.</p> <p>Krabill/Cadieux/ Falvey/Ivanuska Direct pp. 17-19</p> <p>Krabill/Cadieux/ Falvey/Ivanuska Rebuttal pp. 8-9</p>	<p><u>Section 251 of the Act requires that the CLECs agree that SBC's obligations originate under Section 251 only – and not under Section 271. Such a demand is unreasonable, and SBC's proposed language has no place in the interconnection agreement. The CLEC Coalition requests these sections be stricken.</u></p> <p><u>Krabill/Cadieux/ Falvey/Ivanuska Direct pp. 17-19</u></p> <p><u>Krabill/Cadieux/ Falvey/Ivanuska Rebuttal pp. 8-9</u></p>		

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	3						
	4						
	5						
	6						
	7						
	8						
With the instability of the current telecommunications industry, is it reasonable for SBC OKLAHOMA to require a deposit from parties with a proven	9	3.0 et. seq.	<p>3.0 Assurance of Payment <u>It is CLEC's intent to retain current O2A language here!</u></p> <p>3.1 If CLEC can demonstrate a good payment history of one year or more with SBC OKLAHOMA or another ILEC, an Assurance of</p>	The Coalition members (with the exception of Xspedius, addressed separately below) has no objection to the interconnection agreement having some requirements to protect SBC as along as	<p>3.0 Assurance of Payment</p> <p>3.1 Upon request by SBC OKLAHOMA, CLEC will provide SBC OKLAHOMA with adequate assurance of payment of amounts due (or to become due) to SBC OKLAHOMA.</p>	SBC believes that a deposit requirement is a standard business operating practice for companies when extending credit and thus should be determined by reasonable measures	<p>The CLEC, not SBC, should have an option to decide whether the deposit will be in cash or by letter of credit.</p> <p>3.0 Assurance of Payment</p> <p>3.1 Upon request by SBC OKLAHOMA, CLEC will provide SBC OKLAHOMA with adequate</p>

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<p>history of late payments?</p> <p>Coalition Statement of the issue: Should the current O2A language concerning deposits be retained?</p> <p>Xspedius-Only Issue: Should Xspedius be required to provide a deposit in excess of one month's average net billing.</p>			<p><u>Payment will not be required.</u></p> <p><u>3.2 The deposit requirements set forth in this Section 3 apply to the Resale Services and Network Elements furnished under this Agreement. A CLEC furnished both Resale Services and Network Elements in one (1) state under this Agreement shall make two (2) separate deposits for that state, each calculated separately as set forth below in Sections 3.2 through 3.10, inclusive.</u></p> <p><u>CLEC shall remit an initial cash deposit to SBC OKLAHOMA prior to the furnishing of Resale Services or Network Elements in Oklahoma under this Agreement. The deposit required by the previous sentence shall be determined as follows:</u></p> <p><u>3.2.1 for SBC OKLAHOMA, if immediately prior to the Effective Date, CLEC was not operating as a Local Service Provider in Oklahoma the initial deposit shall be in the amount of \$17,000; or</u></p> <p><u>3.2.2 for SBC OKLAHOMA, if immediately prior to the Effective</u></p>	<p>they are commercially reasonable, and has therefore proposed keeping the current O2A deposit requirements. But SBC cannot expect to have no credit risk whatsoever in dealing with any CLEC, nor expect every CLEC to pay the price for the possible bad acts of a handful of players in the industry. SBC states that it is possible, in the worst case scenario, to be exposed to 90 days of charges before a termination can occur (largely because of the need to give the resale customer notice); therefore, it needs 90 days worth of deposit. The CLEC Coalition has offered a 60-day deposit, because this is certainly adequate to protect SBC without putting such a great financial burden on the average CLEC. If a CLEC fails to pay a bill, then SBC has the right, before the 90-day window ends, to cut off new orders. Consequently,</p>	<p>3.2 Assurance of payment may be requested by SBC OKLAHOMA if:</p> <p>3.2.1 at the Effective Date CLEC had not already established satisfactory credit by having made a least twelve (12) consecutive months of timely payments to SBC OKLAHOMA for charges incurred as a CLEC.</p> <p>3.2.2 in SBC OKLAHOMA's reasonable judgment, at the Effective Date or at any time thereafter, there has been an impairment of the established credit, financial health, or credit worthiness of CLEC. Such impairment will be determined from information available from financial sources, including but not limited to Moody's, Standard and Poor's, and the Wall Street Journal. Financial information about CLEC that may be considered includes, but is not limited to, investor</p>	<p>developed by SBC to reduce its risk of loss from nonpayment of undisputed bills. Additionally, the CLEC proposes language that states SBC should also consider CLECs "good payment history of one year or more with SBC OKLAHOMA or another ILEC" is unreasonable. The business relationship is between SBC and the CLEC. SBC has no way of determining the CLEC Coalitions or any other CLECs payment history with another ILEC.</p> <p>CLEC proposes that SBC's initial deposit should be in the amount of \$17,000.</p> <p>SBC OKLAHOMA is offering deposit language that allows SBC OKLAHOMA to assess a reasonable deposit in the event that a CLEC customer is or becomes credit impaired.</p>	<p>assurance of payment of amounts due (or to become due) to SBC OKLAHOMA.</p> <p>3.2 Assurance of payment may be requested by SBC OKLAHOMA if:</p> <p>3.2.1 at the Effective Date CLEC had not already established satisfactory credit by having made a least twelve (12) consecutive months of timely payments to SBC OKLAHOMA for charges incurred as a CLEC.</p> <p>3.2.3 CLEC fails to timely pay a bill rendered to CLEC by SBC OKLAHOMA (except such portion of a bill that is subject to a good faith, bona fide dispute and as to which CLEC has complied with all requirements set forth in Section 9.3); or</p> <p><u>3.3.1 when SBC OKLAHOMA sends CLEC the second delinquency notification during the most recent twelve (12) months; or</u></p> <p><u>3.3.2 when SBC OKLAHOMA suspends CLEC's ability to process</u></p>

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			<p><u>Date, CLEC was operating as a Local Service Provider in Oklahoma, the deposit shall be in the amount calculated using the method set forth in Section 3.7 of this Agreement; or</u></p> <p><u>3.2.3 If CLEC has established a minimum of twelve (12) consecutive months good credit history with all ILEC Affiliates of SBC OKLAHOMA (that is, AMERITECH, NEVADA, PACIFIC, SNET and SWBT) with which CLEC is doing or has done business as a Local Service Provider, SBC OKLAHOMA shall waive the initial deposit requirement; provided, however, that the terms and conditions set forth in Section 3.1 through Section 3.10 of this Agreement shall continue to apply in each state for the Term. In determining whether CLEC has established a minimum of twelve (12) consecutive months good credit history with each ILEC Affiliate of SBC OKLAHOMA with which CLEC is doing or has done business, CLEC's payment record with each ILEC Affiliate of SBC OKLAHOMA for the most recent twelve (12) months occurring within the twenty-four (24) month period immediately prior to</u></p>	<p>any billing by SBC to the CLEC for the second and especially third months is likely to be less than the average on which the deposit is based – resulting in overprotection. The terms of the O2A should not be changed unless SBC demonstrates that, aside from the MCI bankruptcy, it has suffered severe financial losses as a result of this existing provision.</p> <p>Besides the size of the deposit, the CLEC Coalition is also greatly concerned about the unbridled discretion granted by SBC to itself in its proposed Section 3.2.2, whereby SBC may basically review financial publications or other sources and decide to ask for a deposit even when the CLEC has never made a late payment or otherwise demonstrated an unwillingness or inability to keep current with its</p>	<p>warning briefs, rating downgrades, and articles discussing pending credit problems; or</p> <p>3.2.3 CLEC fails to timely pay a bill rendered to CLEC by SBC OKLAHOMA (except such portion of a bill that is subject to a good faith, bona fide dispute and as to which CLEC has complied with all requirements set forth in Section 9.3); or</p> <p>3.2.4 CLEC admits its inability to pay its debts as such debts become due, has commenced a voluntary case (or has had an involuntary case commenced against it) under the U.S. Bankruptcy Code or any other law relating to insolvency, reorganization, winding-up, composition or adjustment of debts or the like, has made an assignment for the benefit of creditors or is subject to a receivership or similar proceeding.</p>	<p>Therefore, SBC OKLAHOMA proposes that the deposit be in an amount equal to three (3) months anticipated charges. SBC OKLAHOMA disagrees with CLEC COALITION's proposal of \$17,000 because it bills the average CLEC in Oklahoma \$74,568 per month. Based on the proposed disconnection timeline, SBC is exposed to 90 days of service or \$223,704 for the average CLEC. SBC's proposed language is objective and reasonable for both Parties. It balances the need of SBC OKLAHOMA to protect itself and also protect the good paying CLEC from the requirement to pay a deposit.</p> <p>3.3 SBC OKLAHOMA believes that deposits that are retained should be applied at the holder's</p>	<p><u>orders in accordance with Section 10.4; or</u></p> <p><u>3.3.3 when CLEC files for protection under the bankruptcy laws; or when an involuntary petition in bankruptcy is filed against CLEC and is not dismissed within sixty (60) days; or 3.3.5 when this Agreement expires or terminates.</u></p> <p>3.4 The Cash Deposit or Letter of Credit must be in an amount equal to two (2) months anticipated charges (including, but not limited to, recurring, non-recurring and usage sensitive charges, termination charges and advance payments), as reasonably determined by SBC OKLAHOMA, for the Interconnection, Resale Services, Unbundled Network Elements, Collocation or any other functions, facilities, products or services to be furnished by SBC OKLAHOMA under this Agreement.</p> <p>3.5 To the extent that a CLEC elects to make a Cash Deposit, the Parties intend that the provision of such Cash Deposit shall constitute the grant of a security interest in the Cash Deposit pursuant to Article 9 of the</p>

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			<p><u>the Effective Date shall be considered.</u></p> <p><u>3.3 Any cash deposit shall be held by SBC OKLAHOMA as a guarantee of payment of charges billed to CLEC, provided, however, SBC OKLAHOMA may exercise its right to credit any cash deposit to CLEC's account upon the occurrence of any one of the following events:</u></p> <p><u>3.3.1 when SBC OKLAHOMA sends CLEC the second delinquency notification during the most recent twelve (12) months; or</u></p> <p><u>3.3.2 when SBC OKLAHOMA suspends CLEC's ability to process orders in accordance with Section 10.4; or</u></p> <p><u>3.3.3 when CLEC files for protection under the bankruptcy laws; or when an involuntary petition in bankruptcy is filed against CLEC and is not dismissed within sixty (60) days; or 3.3.5 when this Agreement expires or terminates; or</u></p> <p><u>3.3.6 during the month following the expiration of twelve (12) months after that cash deposit was remitted,</u></p>	<p>payments to SBC. SBC's language permits it to unilaterally determine potential impairment from sources as ephemeral as an article in the press about "pending credit problems." Such sources for making a decision on requiring a deposit are not concrete, clearly defined, or objective – they can consist of nothing but rumor. If a CLEC is having any financial difficulties or cash flow problems whatsoever, the requirement of a cash deposit could put it over the edge and cause a manageable problem to become unmanageable. CLECs do not believe SBC should be given the ability to damage its competitive rivals in this manner at its own whim. Instead, SBC should not be able to ask for a deposit unless the CLEC has failed to timely pay its bills to SBC.</p> <p>As to the issue concerning</p>	<p>3.3 Unless otherwise agreed by the Parties, the assurance of payment will, at SBC OKLAHOMA's option, consist of:</p> <p>3.3.1 a cash security deposit in U.S. dollars held by SBC OKLAHOMA ("Cash Deposit") or</p> <p>3.3.2 an unconditional, irrevocable standby bank letter of credit from a financial institution acceptable to SBC OKLAHOMA naming SBC OKLAHOMA as the beneficiary thereof and otherwise in form and substance satisfactory to SBC OKLAHOMA ("Letter of Credit").</p> <p>3.4 The Cash Deposit or Letter of Credit must be in an amount equal to three (3) months anticipated charges (including, but not limited to, recurring, non-recurring and usage sensitive charges, termination charges and</p>	<p>discretion.</p> <p>3.3.7 SBC OKLAHOMA believes that the appropriate interest rate to be paid on deposits should be equal to the state tariffed rate as approved by the OCC.</p> <p>SBC OKLAHOMA also objects to the reevaluation criteria proposed by CLEC in 3.5. If after the deposit is re-evaluated, it is determined that an increase is appropriate, SBC OKLAHOMA proposes to increase the deposit if the actual billing average for the three (3) month period exceeds the deposit amount held. Again, SBC seeks to maintain a deposit if needed, equivalent to three (3) months average billing in order to reduce its exposure should a disconnection of service become necessary.</p>	<p>Uniform Commercial Code in effect in any relevant jurisdiction.</p> <p><u>3.3.7 For the purposes of this Section 3.3, interest will be calculated as specified in Section 8.2 and shall be credited to CLEC's account at the time that the cash deposit is credited to CLEC's account.</u></p> <p><u>3.4 So long as CLEC maintains timely compliance with its payment obligations, SBC OKLAHOMA will not increase the deposit amount required. If CLEC fails to maintain timely compliance with its payment obligations, SBC OKLAHOMA reserves the right to require additional deposit(s) in accordance with Section 3.1 and Section 3.5 through Section 3.10.</u></p> <p><u>3.5 If during the first six (6) months of operations, CLEC has been sent one delinquency notification letter by SBC OKLAHOMA, the deposit amount shall be re-evaluated based upon CLEC's actual billing totals and shall be increased if CLEC's actual billing average:</u></p>

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			<p><u>SBC OKLAHOMA shall credit any cash deposit to CLEC's account so long as CLEC has not been sent more than one delinquency notification letter during the most recent twelve (12) months.</u></p> <p><u>3.3.7 For the purposes of this Section 3.3, interest will be calculated as specified in Section 8.2 and shall be credited to CLEC's account at the time that the cash deposit is credited to CLEC's account.</u></p> <p><u>3.4 So long as CLEC maintains timely compliance with its payment obligations, SBC OKLAHOMA will not increase the deposit amount required. If CLEC fails to maintain timely compliance with its payment obligations, SBC OKLAHOMA reserves the right to require additional deposit(s) in accordance with Section 3.1 and Section 3.5 through Section 3.10.</u></p> <p><u>3.5 If during the first six (6) months of operations, CLEC has been sent one delinquency notification letter by SBC OKLAHOMA, the deposit amount shall be re-evaluated based upon</u></p>	<p>establishing a credit history with SBC Oklahoma, a CLEC new to Oklahoma should not have to pay a deposit if it has already established a good credit history with SBC Oklahoma's affiliates in other states. There is simply no rational commercial justification for the imposition of what is nothing less than a penalty for attempting to enter into competition with SBC Oklahoma. Finally, the CLEC (and not SBC) should have the option of picking whether to satisfy any deposit requirement by using cash or a letter of credit. SBC is protected either way, so the option should be left to the CLEC.</p> <p>In the recent T2A proceeding, the Texas Commission agreed that giving SBC such unbridled discretion was bad policy. Consequently, the Texas PUC is requiring SBC to</p>	<p><u>advance payments), as reasonably determined by SBC OKLAHOMA, for the Interconnection, Resale Services, Unbundled Network Elements, Collocation or any other functions, facilities, products or services to be furnished by SBC OKLAHOMA under this Agreement.</u></p> <p><u>3.5 To the extent that SBC OKLAHOMA elects to require a Cash Deposit, the Parties intend that the provision of such Cash Deposit shall constitute the grant of a security interest in the Cash Deposit pursuant to Article 9 of the Uniform Commercial Code in effect in any relevant jurisdiction.</u></p> <p><u>3.6 A Cash Deposit will accrue simple interest, however, SBC OKLAHOMA will not pay interest on a Letter of Credit.</u></p> <p><u>3.7 SBC OKLAHOMA may, but is not obligated to,</u></p>	<p>3.8 SBC OKLAHOMA believes that assessing a deposit based on individual billing account number would be both administratively burdensome and also could lead to the inappropriate movement of services between billing account numbers. SBC OKLAHOMA believes that deposits should be assessed on an overall customer basis.</p> <p>3.9 SBC agrees that an irrevocable Bank Letter of Credit can satisfy its deposit requirements provided it meets the criteria specified in SBC's proposed assurance of payment language. Quate Direct pp. 40-45 Quate Rebuttal pp. 21-26</p>	<p><u>3.5.1 for SBC OKLAHOMA for a two (2) month period exceeds the deposit amount held; or</u></p> <p><u>3.6 Throughout the Term, any time CLEC has been sent two (2) delinquency notification letters by SBC OKLAHOMA, the deposit amount shall be re-evaluated based upon CLEC's actual billing totals and shall be increased if CLEC's actual billing average;</u></p> <p><u>3.6.1 for SBC OKLAHOMA for a two (2) month period exceeds the deposit amount held; or</u></p> <p><u>3.7 Whenever a deposit is re-evaluated as specified in Section 3.5 or Section 3.6, such deposit shall be calculated in an amount equal to the average billing to CLEC for a two (2) month period. The most recent three (3) months billing on all of CLEC's CBAs and BANs for Resale Services or Network Elements within that state shall be used to calculate CLEC's monthly average.</u></p> <p><u>3.7.1 After calculating the amount equal to the average billing to CLEC for a two (2) month period in</u></p>

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			<p><u>CLEC's actual billing totals and shall be increased if CLEC's actual billing average:</u></p> <p><u>3.5.1 for SBC OKLAHOMA for a two (2) month period exceeds the deposit amount held; or</u></p> <p><u>3.6 Throughout the Term, any time CLEC has been sent two (2) delinquency notification letters by SBC OKLAHOMA, the deposit amount shall be re-evaluated based upon CLEC's actual billing totals and shall be increased if CLEC's actual billing average:</u></p> <p><u>3.6.1 for SBC OKLAHOMA for a two (2) month period exceeds the deposit amount held; or</u></p> <p><u>3.7 Whenever a deposit is re-evaluated as specified in Section 3.5 or Section 3.6, such deposit shall be calculated in an amount equal to the average billing to CLEC for a two (2) month period. The most recent three (3) months billing on all of CLEC's CBAs and BANs for Resale Services or Network Elements within that state shall be used to calculate CLEC's monthly average.</u></p>	<p>make decisions on deposits for established CLECs based solely on the CLEC's payment history. Similarly, in the K2A proceeding, the Arbitrator agreed that SBC's language is unreasonable, and adopted the CLEC Coalition's language on all sub-issues.</p> <p>Xspedius preliminary position: At any given time, SBC Oklahoma owes Xspedius significantly more in reciprocal compensation that Xspedius owes SBC under the ICA. SBC is therefore more than adequately assured of payment. This imbalance of payments has historically been true. Xspedius therefore believes that it should not be required to submit a deposit to SBC (assuming circumstances warrant) in excess of one month's billings by SBC to Xspedius, less the average monthly amount SBC owes</p>	<p>draw on the Letter of Credit or the Cash Deposit, as applicable, upon the occurrence of any one of the following events:</p> <p>3.7.1 CLEC owes SBC OKLAHOMA undisputed charges under this Agreement that are more than thirty (30) calendar days past due; or</p> <p>3.7.2 CLEC admits its inability to pay its debts as such debts become due, has commenced a voluntary case (or has had an involuntary case commenced against it) under the U.S. Bankruptcy Code or any other law relating to insolvency, reorganization, winding-up, composition or adjustment of debts or the like, has made an assignment for the benefit of creditors or is subject to a receivership or similar proceeding; or</p> <p>3.7.3 The expiration or termination of this Agreement.</p>		<p><u>Oklahoma, SBC OKLAHOMA shall add the amount of any charges that would be applicable to transfer all of CLEC's then-existing End-Users of Resale Services to SBC OKLAHOMA in the event of CLEC's disconnection for non-payment of charges. The resulting sum is the amount of the deposit.</u></p> <p><u>[Xspedius only]</u></p> <p><u>3.7.1 In no event will Xspedius be subject to an assurance of payment to SBC OKLAHOMA that exceeds two months' projected average billing by SBC OKLAHOMA to Xspedius, less the amount of billings by Xspedius to SBC OKLAHOMA. If SBC owes Xspedius more than \$500,000, then a deposit would not be required until such time as the outstanding balance is reduced below this amount.</u></p> <p>3.7.3 The expiration or termination of this Agreement.</p> <p>3.8 If SBC OKLAHOMA draws on the Letter of Credit or Cash Deposit, upon request by SBC OKLAHOMA, CLEC will provide a replacement or supplemental letter of credit or cash deposit conforming to</p>

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GT&C

Issue Statement	Issue No.	Attachment and Section(s)	CLEC Language	CLEC Preliminary Position	SBC OKLAHOMA Language	SBC OKLAHOMA Preliminary Position	Arbitrator's Recommendation
			<p><u>3.7.1 After calculating the amount equal to the average billing to CLEC for a two (2) month period in Oklahoma, SBC OKLAHOMA shall add the amount of any charges that would be applicable to transfer all of CLEC's then-existing End-Users of Resale Services to SBC OKLAHOMA in the event of CLEC's disconnection for non-payment of charges. The resulting sum is the amount of the deposit.</u></p> <p><u>[Xspedius only]</u></p> <p><u>3.7.1 In no event will Xspedius will be subject to an assurance of payment to SBC OKLAHOMA that exceeds one month's projected average billing by SBC OKLAHOMA to Xspedius, less the amount of billings by Xspedius to SBC OKLAHOMA. If SBC owes Xspedius more than \$500,000, then a deposit would not be required until such time as the outstanding balance is reduced below this amount.</u></p> <p><u>3.8 Whenever a deposit is re-evaluated as specified in Section 3.5 and Section 3.6, CLEC shall remit the additional deposit amount to SBC</u></p>	<p>Xspedius. Further, if SBC's disputed amounts exceed \$500,000, then Xspedius should not have to pay a deposit to SBC under any circumstances. In the K2A successor proceeding, the Arbitrator agreed that it would be unfair to require a deposit of Xspedius when the amounts owed are so out of balance.</p> <p>Krabill/Cadieux/ Falvey/Ivanuska Direct pp. 23-26</p> <p>Xspedius issue – Falvey Interconnection/ GT&C Direct pp. 19-21</p> <p>Krabill/Cadieux/ Falvey/Ivanuska Rebuttal pp. 13-16</p>	<p>3.8 If SBC OKLAHOMA draws on the Letter of Credit or Cash Deposit, upon request by SBC OKLAHOMA, CLEC will provide a replacement or supplemental letter of credit or cash deposit conforming to the requirements of Section 3.3.</p> <p>3.9 Notwithstanding anything else set forth in this Agreement, if SBC OKLAHOMA makes a request for assurance of payment in accordance with the terms of this Section, then SBC OKLAHOMA shall have no obligation thereafter to perform under this Agreement until such time as CLEC has furnished SBC OKLAHOMA with the assurance of payment requested; provided, however, that SBC OKLAHOMA will permit CLEC a minimum of ten (10) Business Days to respond to a request for assurance of</p>		<p>the requirements of Section 3.3.</p> <p>3.9 Notwithstanding anything else set forth in this Agreement, if SBC OKLAHOMA makes a request for assurance of payment in accordance with the terms of this Section, then SBC OKLAHOMA shall have no obligation thereafter to perform under this Agreement until such time as CLEC has furnished SBC OKLAHOMA with the assurance of payment requested; provided, however, that SBC OKLAHOMA will permit CLEC a minimum of twelve (12) Business Days to respond to a request for assurance of payment before invoking this Section.</p> <p><u>3.9.1 Any cash deposit requirement may be satisfied in whole or in part with an irrevocable bank letter of credit acceptable to SBC OKLAHOMA, or a surety bond underwritten by a company approved by the Oklahoma Insurance Department to underwrite such surety bonds. No interest shall be paid by SBC OKLAHOMA for any portion of the deposit requirement satisfied by an</u></p>

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Key: **Bold** represents language proposed by SBC and opposed by CLECs.
Bold and Underline language represents language proposed by CLEC and opposed by SBC.